IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 911-913

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, A CORPORATION, AND WABASH RAILROAD COMPANY, A CORPORATION,

Petitioners,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, A CORPORATION; HOLMAN D. PETTIBONE AND L. F. DERAMUS, TRUSTEES OF CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY; CHICAGO AND WESTERN INDIANA RAILROAD COMPANY, A CORPORATION, AND CHICAGO AND ERIE RAILROAD COMPANY, A CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

Appendix.

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To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY (substituted third party defendant, hereinafter

referred to as "Eastern Illinois")*, and WABASH RAILROAD COMPANY (substituted third party defendant, hereinafter referred to as "Wabash"), respectfully pray for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit (hereinafter sometimes referred to as the "Circuit Court") to review the decision and judgment of that Court rendered March 17, 1943, as modified by its decision and judgment of January 21, 1944 (except that portion of the latter dealing with the Grand Trunk payment).

* The short terms used with reference to the parties include all their respective predecessors.

SUMMARY OF THE MATTER INVOLVED.

(a) General Facts.

The respondent, Western Indiana Railroad Company (hereinafter referred to as "Western Indiana"), plaintiff and third party plaintiff in the District Court, was organized in 1879. It owns and operates the Dearborn Station, one of the largest and most important railroad terminals in Chicago, Illinois, and railroad lines and facilities extending south from the station and diverging at 87th Street into two branches, one continuing south to Dolton, Illinois, and the other extending southeasterly to the Indiana state line (R. 178, 401, 676).

The main line, together with property adjacent thereto devoted to yards, switches, turnouts, engine houses and similar purposes, and practically all of Dearborn Station has been and is known as the "common property" over which Western Indiana and its various lessees operate their trains in common with each other (R. 178, 402). Western Indiana also owns certain other property, known as "exclusive property," which has been leased to some one or more of its lessees for exclusive use by the lessee and which is only collaterally and not directly involved in this proceeding (R. 402, 529-531, 609-611).

The common property of Western Indiana is used as a railroad terminal by six interstate railroads, namely, Chicago and Erie Railroad Company (hereinafter referred to as "Erie"), Grand Trunk Western Railroad Co. (hereinafter referred to as "Grand Trunk"), Holman D. Pettibone, *et al.*, Trustees of Chicago, Indianapolis and Louisville Railway Co. (hereinafter referred to as "Monon"), Eastern Illinois, Wabash and Atchison, Topeka & Santa Fe

Railway Co. (hereinafter referred to as "Santa Fe") (R. 401). Erie, Grand Trunk and Monon, together with Western Indiana, are respondents herein. Santa Fe has never been a party in the case.

These railroads enter Western Indiana's common property at different points along the system (R. 193, 401, 676), and the volume of traffic of each varies (R. 671-675). In addition, some portions of the common property are also used by the Belt Railway Company of Chicago (hereinafter referred to as "the Belt") and the Elgin, Joliet & Eastern Railway Company (hereinafter referred to as "E. J. & E.") under separate leases from Western Indiana (R. 357, 401, 659, 676).

Under their respective leases, all made subsequent to 1882 (R. 211-217, 219-221, 238-240), the Santa Fe, the Belt, and the E. J. & E. have paid their wheelage proportion of certain expenses of Western Indiana as defined in their respective leases, and have also paid to Western Indiana annually large fixed rentals (R. 357-358, 659). During 1937, a typical year, such fixed rentals were at least $499,000 (R. 344).

Western Indiana has never operated any through trains, but since 1904 it has operated suburban passenger trains over the common property, and since 1913 it has handled freight traffic thereon between connecting railroads and shippers located on its line (R. 342-344, 402).

Since 1879 Western Indiana has from time to time made leases to the five tenant owners* and has also executed a number of contracts with said five tenant owners of which two are pertinent. These two contracts, and those leases which include a demise of any part or all of the common property, contain varying definitions of Western Indiana's expenses to be paid by the five tenant owners on a wheelage

* Eastern Illinois, Wabash, Grand Trunk, Erie, and Monon.

basis. By each of said leases Western Indiana demised to the lessee or lessees the right to use, together with others enjoying similar rights, certain designated portions of its common property for a term of 999 years, and by some of said leases also demised the right to use exclusively certain of its other property.

On November 2, 1882 the five tenant owners acquired all of the Western Indiana capital stock in equal proportions, and they have at all times since so continued to own the same. By agreement, each of the five tenant owners was to be equally represented on the board of directors of Western Indiana, and at all times since that date each of the five tenant owners has been so represented by a director on said board (R. 196-198, 357).

The pertinent documents in this case are the Inter-Tenant Agreement of November 1, 1882 (hereinafter referred to as the "1882 Agreement") (R. 196-202), the Preliminary Proprietary Agreement of January 16, 1902 (hereinafter referred to as the "1902 Agreement") (R. 509-528), and the Joint Supplemental Lease of July 1, 1902 (hereinafter referred to as the "1902 Lease") (R. 529-556).

The 1882 Agreement, which covers a number of miscellaneous matters, was executed by Western Indiana, party of the first part, and the five tenant owners, parties of the second part (R. 196, 197). Paragraphs 5th and 6th thereof relate solely to the definition of Western Indiana's expenses payable on a wheelage basis and the manner of apportioning the same (R. 199-200).

The definition of such expenses in paragraph 6th covers certain enumerated expenses of Western Indiana including "all other claims and demands of every name, nature and description, for which the Western Indiana Company may be legally liable, excepting its mortgage debt and the interest thereon." (This quoted portion is hereinafter

referred to as the "all inclusive clause".) Claims and demands payable exclusively by any of the tenant owners and the cost of permanent improvements and of additions to the Western Indiana Company property are excluded entirely from such definition (R. 199-200).

Paragraph 5th provided that the parties of the second part (the five tenant owners) should pay the expenses so defined in paragraph 6th and that each of said parties undertook and agreed to pay monthly a certain proportion thereof "such proportion to be determined by the engine and car mileage of each party to the gross engine and car mileage of all the parties" over the common property (R. 199).

The 1902 Agreement is a contract of precisely the same character as the 1882 Agreement which was also executed between Western Indiana, party of the first part, and the five tenant owners, parties of the second part (R. 509-518). It provides for an entire rearrangement of the rights of the five tenant owners, which, in substance, embraced the following:

(1) The equal right to each of the five tenant owners to use the common property on an equal basis as to payment of the cost thereof (R. 222-223, 510-516);

(2) The purchase and extinguishment of all exceptional rights, privileges and exemptions theretofore enjoyed by any of the five tenant owners (R. 510-512); and

(3) In paragraph Ninth, a complete new definition of expenses of Western Indiana to be paid on a wheelage basis (limited to enumerated expenses of the common property, and enlargements and improvements thereof) and a new method of apportioning said expenses under which the proportion of each of the five tenant owners should thereafter be in the ratio of "their several wheelage uses to the total wheelage use of said railroad" (R. 223, 516).

Said 1902 Agreement further provides that these various matters be embodied in a new joint lease (R. 221-223, 513-517).

The 1902 Lease was executed for a term of 999 years (R. 227, 535) between Western Indiana, as lessor and party of the first part, the five tenant owners, as lessees and parties of the second part, and the Trustee under the mortgage to secure Western Indiana's new bond issue, as party of the third part (R. 224, 529, 548). It carried out all of the matters and things provided in the 1902 Agreement to be effectuated by said Lease (R. 224-238, 529-547).

Paragraph 33 of said Lease is practically identical with the provisions of paragraph Ninth of the 1902 Agreement. Here once more there is provided a complete new definition of the expenses of Western Indiana to be paid on a wheelage basis after July 1, 1902, which is limited to common property expenses, including enlargements and improvements thereof and additions thereto, and a new method of apportioning such expenses to each of the five tenant owners, the proportion of each to be in the ratio of "their several wheelage uses of the various portions of said railroad to the total wheelage use thereof" (R. 234-235, 543-544).

Five later joint supplemental leases, each for a term of 999 years, were executed between Western Indiana, the five tenant owners, and the mortgage trustees in 1917, 1920, 1925, 1932 and 1936 (R. 361-362, 557-626). Each refers to the provisions of paragraph 33 of the 1902 Lease and then repeats almost identically and without material change the language of paragraph 33 as to both the definition of wheelage expenses and the method of apportioning the same (R. 244-248, 361-362).

The expenses involved in C. C. A. appeals Nos. 7875,

7876 and 7877, as to which the decision of the Circuit Court is hereby sought to be reviewed, are as follows:

(1) Annual payments by Western Indiana for the cost of acquisition of certain additions to its common property which it acquired in and after 1905 (R. 309-316). The District Court held that these payments, which are frequently referred to as the "disputed rentals," should be charged to the five tenant owners on an equal basis, in line with the long continued practice of Western Indiana. The Circuit Court reversed, holding that such payments should be charged on a wheelage basis.

(2) The expenses of Western Indiana in conducting its suburban and freight switching operations, referred to frequently as "Western Indiana's separate railroad operations," which it has never since 1904 charged to the tenant owners (R. 342-352) but which the Circuit Court, reversing the District Court (which approved Western Indiana's practice), held should be charged to the five tenant owners on a wheelage basis.

(3) Certain miscellaneous charges and expenses of Western Indiana, including federal income taxes, which it has, with unimportant exceptions, never since 1902 charged to the five tenant owners (R. 352-356), but which the Circuit Court, reversing the District Court, held should be charged to the five tenant owners on a wheelage basis.

The foregoing groups of expenses for one year (1937) amounted to approximately $455,000* (R. 309-316, 350-356), and the total amounts payable under the decision of the Circuit Court during the remainder of the terms of the leases (approximately 950 years) will aggregate many hundreds of millions of dollars.

Another expense item originally involved in said three appeals was the sum of $20,665.35 paid since 1902 and pay-

* We believe this Court will take judicial notice of the fact that federal income taxes (one of the heaviest expenses) have increased very substantially since 1937.

able annually by Western Indiana to Grand Trunk until the latter shall use Western Indiana's railroad south of 49th Street in Chicago. This payment, which originated in the 1902 Agreement and was effectuated by the 1902 Lease, was and is made as compensation to Grand Trunk for its release in 1902 of certain pecuniary benefits enjoyed by it under a previous agreement dated November 1, 1891. In view of the final decision of the Circuit Court of January 21, 1944, hereinafter referred to, no review of this expense item is sought by petitioners.

The acts and conduct of Western Indiana and the five tenant owners subsequent to 1902 with reference to Western Indiana's method of handling these expenses and the charging and payment thereof, and particularly the numerous discussions of such matters and problems relating thereto by Western Indiana directors, as shown by the stipulation of facts (R. 316-357), do not reveal that at any time between 1902 and 1938 any of the parties ever asserted or claimed that any of the foregoing expenses were controlled or in any manner affected by the provisions of paragraphs 5th and 6th of the old 1882 Agreement, despite the fact that during all such period the five tenant owners owned equally all the Western Indiana stock and each had its own representative on the Board of Directors of Western Indiana.

Prior to 1938 none of the five tenant owners ever objected to or questioned the method employed by Western Indiana in handling any of the foregoing expenses, with the exception of the disputed rentals item, as to which no objection was made until 1915, when Monon first claimed that this item should be payable on a wheelage basis (but not because of the 1882 Agreement). All of the other roads, however, continued to pay such item on an equal basis as charged by Western Indiana until 1933,

when Erie and Grand Trunk for the first time commenced paying on a wheelage basis (but again not because of the 1882 Agreement) (R. 316-357, 421-426).

(b) History of the Litigation.

The litigation was commenced by a complaint filed by Western Indiana in the District Court of the United States for the Northern District of Illinois, Eastern Division (herein referred to as the "District Court"), against Erie, in which it was charged that although Erie had paid its proper proportion of Western Indiana's management expenses through March, 1933, it had thereafter refused to pay such proportion of such expenses. Judgment for $114,071.13 was demanded (R. 2-25).

Erie's answer (R. 25-46) included a counterclaim (R. 28-46) (to which Western Indiana replied) in which it demanded judgment for $126,852.72 because of alleged overpayment by it on account of such management expenses plus $121,804.97 on account of alleged overpayment of its proportion of other expense items allegedly payable by the five tenant owners on a wheelage basis, and sought an accounting as to certain other alleged expense items.

Thereupon, Western Indiana filed a third party complaint (R. 57-64) making third party defendants the remaining four tenant owners, Grand Trunk, Monon, Eastern Illinois and Wabash. It subsequently filed an amendment to said third party complaint (R. 373-376). By these pleadings it sought a declaratory judgment as to the respective rights and liabilities of itself and the third party defendants respecting the expenses involved in this case and sought an accounting and judgment thereon against each third party defendant for the amount which might be found due from it (R. 64, 376). The reason stated by Western Indiana for seeking such declaratory judgment

was that if the methods then pursued by it in handling all of said expense items were not correct, it was without knowledge as to the proper methods to use, and therefore it sought the advice and assistance of the Court. (R. 62-64, 375-376).

In an amendment to its reply to the Erie counterclaim, Western Indiana sought similar relief against Erie (R. 370-372). Erie filed a reply to this pleading in which it asserted numerous defenses (R. 377-381).

Answers were filed to the third party complaint by all of the third party defendants alleging numerous defenses (R. 65-101, 169-174, 389-395); Grand Trunk and Monon also filed substantially similar counterclaims against Western Indiana and Erie and cross-claims against their third party co-defendants (R. 89-101), which injected the balance of the expense items involved in this case. Appropriate responsive pleadings were filed to these counterclaims and cross-claims (R. 67-76, 79-91, 95-96, 101-132, 154-157, 164-168, 174-176, 367-368).

The case was heard in the District Court entirely upon a stipulation of facts (R. 177-358), a supplemental stipulation of facts (R. 359-365), the leases, the 1882 Agreement, the later 1902 Agreement and other exhibits.

The District Court by its decision (R. 382-388), decree (R. 442-447), findings of fact (R. 401-435) and conclusions of law (R. 435-440), held among other things:

> (1) that since 1902 paragraph 33 of the 1902 Lease (which effectuated the provisions of paragraph Ninth of the 1902 Agreement) has been the controlling agreement between Western Indiana and the five tenant owners defining the expenses of Western Indiana for which it is to be reimbursed directly by said five tenant owners on a wheelage basis and providing the method of apportioning such expenses among said five tenant owners;

(2) that said paragraph 33 and paragraph Ninth provided a new definition of such wheelage expenses and a new method of apportioning the same among the five tenant owners;

(3) that the provisions of these paragraphs, being inconsistent with the provisions of earlier agreements and leases on the same subject matter, superseded and abrogated all such earlier provisions and, specifically, superseded and abrogated the provisions of paragraphs 5th and 6th of the 1882 Agreement; and

(4) that this result was intended by Western Indiana and its five tenant owners (R. 387, 410-411, 435-436, 442-443).*

Four separate appeals were prosecuted from the decree of the District Court as follows: (1) by Grand Trunk, C. C. A. No. 7875; (2) by Monon, C. C. A. No. 7876; (3) by Western Indiana, C. C. A. No. 7877**; and (4) by Erie, C. C. A. No. 7878.

On March 17, 1943 the Circuit Court rendered a decision, opinion by Evans, Circuit Judge (140 F. 2d 120), in appeals Nos. 7875, 7876 and 7877(R. 710-721), reversing the decree of the District Court. The Circuit Court rejected the view of petitioners and of the District Court that paragraphs 5th and 6th of the old 1882 Agreement were superseded and abrogated by the 1902 Agreement and Lease, and held that the "all inclusive clause" in said paragraph 6th is still effective and controlling as to the definition of expenses of Western Indiana payable on a wheelage basis, and that therefore the five tenant owners are liable on a wheelage basis for all of the expense items involved in said appeals.

The opinion discloses that the Court's decision of this

* The findings of fact and conclusions of law upon which the foregoing summary is based are set forth in the Appendix, pp. 29-30.

** The Western Indiana appeal was taken only to protect its position as against its tenants regardless of the decision rendered by the Circuit Court of Appeals.

important litigation was predicated entirely upon the erroneous theory, original with the Court and neither urged nor raised by any respondent,* that paragraph 37 (R. 236, 545) of the 1902 Lease (which provision the Court held to be controlling) referred to and included the old 1882 Agreement (which is not a lease), and preserved paragraphs 5th and 6th thereof (R. 718-721).

But paragraph 37** refers only to "said existing *leases*" which are listed in paragraph 3 of said 1902 Lease (R. 530-531). The 1882 *Agreement* is not there listed.

Throughout the opinion, however, Evans, Circuit Judge, has used interchangeably the words "lease" and "agreement" as though they were synonymous, and has treated the 1882 Agreement as though it was one of "said existing leases."

The Court cast aside and gave no effect to the provisions of the 1902 Agreement upon which the newly discovered evidence (subsequently discussed) has an extremely important bearing. It held that this Agreement was merely preliminary in fact and that it was merged in the 1902 Lease (R. 719). The stipulated facts (R. 177-365), however, particularly as augmented by such newly discovered evidence (R. 779-916), clearly show and establish beyond doubt that the 1902 Agreement was the paramount instrument and that the 1902 Lease merely carried out and effectuated the provisions contained in said 1902 Agreement.

In this same opinion, the Court stated that the only question presented for its determination was what effect the 1902 Agreement (evidently meaning the 1902 Lease) had upon existing leases (R. 719). However, after so stating and characterizing this question, the Court ignored it completely and never rendered any decision thereof.

* The briefs filed by respondents in the Circuit Court have been certified to this Court.

** Set out in full, *infra*, p. 20.

On March 19, 1943 the Circuit Court rendered a separate decision, opinion also by Evans, Circuit Judge (140 F. 2d 126), in the Erie appeal, C. C. A. No. 7878,* which also reversed the decree of the District Court but dealt only with the issue involving the method of apportioning management expenses. The Court based its decision in this appeal, however, on the theory that paragraph 33 of the 1902 Lease was the controlling provision, which was in accord with the contentions of both Western Indiana and Erie, the only parties to said appeal.

On March 31, 1943 Eastern Illinois and Wabash seasonably filed a petition for rehearing in appeals Nos. 7875, 7876 and 7877 in which they pointed out the basic errors in the Circuit Court's decision in said appeals. In the interest of brevity, we respectfully refer this Court to that petition (R. 725-758).

On July 2, 1943 and while the petition for rehearing was still pending, Eastern Illinois and Wabash filed their petition for leave to present certain newly discovered evidence, consisting entirely of duly certified copies of or excerpts from the original files and records of Western Indiana (R. 772-928). As alleged in said petition, part of said new evidence was offered to show exactly how the amount of the Grand Trunk payment was arrived at and that such payment was to be borne by the five tenant owners equally, as contended by Eastern Illinois, Wabash and Erie, and not on a wheelage basis, as contended by Grand Trunk and Monon** (R. 778-779).

Also as alleged in said petition, the balance of said newly discovered evidence was offered to show: (1) that the 1902 Agreement was not a casual or mere preliminary document, but that it was the result of prolonged and most careful

* Set forth in full in the Appendix, p. 12.

** This portion is no longer in controversy, in view of the January 21, 1944 final decision of the Circuit Court hereinafter referred to.

study and consideration by the representatives of the five tenant owners and by the Western Indiana directors; (2) that in 1900 the parties were not satisfied with the arrangements under which they were working and had been endeavoring for some time past to find a solution of their difficulties and to arrive at the basis of a new agreement (R. 779-780); (3) that at a meeting in July 1900, which initiated the protracted and arduous negotiations and discussions which culminated in the 1902 Agreement, their authorized representatives, after prolonged debate, unanimously adopted the following resolution:

> "RESOLVED, That we believe it to be for the interest of both the Western Indiana Railroad and each of its proprietary tenants that all existing contracts between them be cancelled and a new agreement be entered into between such proprietary tenants and this Company that shall require each of said tenants to bear equally the cost of the existing joint property which they have a right to use under present rentals and all future improvements and betterments thereon, and that shall require each tenant in the future to pay all operating expenses and taxes in proportion to their respective wheelage on said property, and that for this purpose in such adjustment the fair value of special contract advantages shall be adjusted.
>
> "FURTHER, That in case for any reason this cannot be legally done, a contract that shall efficiently accomplish this object shall be made.
>
> "RESOLVED FURTHER, That the proper officers of this Company be requested to take such action as they shall deem practicable to bring about this result." (R. 780);

(4) that the 1902 Agreement was prepared and entered into pursuant to said resolution, and (5) that the parties fully intended that paragraph Ninth of said Agreement should supersede and abrogate the provisions of paragraphs 5th and 6th of the old 1882 Agreement, which was the exact result accomplished under the applicable rule of

law as maintained by Eastern Illinois and Wabash and as held by the District Court (R. 780-782).

On January 21, 1944 the Circuit Court rendered its final decision, opinion also by Evans, Circuit Judge (140 F. 2d 130) (R. 944-947), denying the petition for leave to present newly discovered evidence for the reasons that (1) it was inadmissible because "the written agreement in question" (although not identified by the Court) was not ambiguous, and (2) "a study of this evidence fails to substantiate the claim that the parties actually intended to apportion certain items of cost on an equal basis, rather than upon the wheelage basis" (R. 946-947).

The reasons ascribed by the Court for denying the petition are entirely unrelated to, and show a complete misconception of, the purposes for which the evidence was offered.

The Court held that diligence was shown in presenting the new evidence and that the Court had power to allow the petition (R. 946). The authenticity of the evidence was not challenged by any respondent.

The Court also in its final decision of January 21, 1944 denied the petition for rehearing, but it admitted that its previous decision as to the Grand Trunk payment was erroneous. It reversed this decision and held that said payment was apportionable among the five tenant owners on an equal basis (R. 947).

The three opinions of the Circuit Court and the opinion of the District Court are set forth in full in the Appendix at pages 1, 12, 18 and 22, respectively.

Basis for the Jurisdiction of This Court to Review the Judgment in Question.

(1) The statutory provision believed to sustain the jurisdiction of this Court is Section 347(a) of Title 28, U. S. Code Annotated.

(2) This petition was filed in this Court within the time required by Section 350 of Title 28, U. S. Code Annotated.

The first decision of the Circuit Court, in appeals Nos. 7875, 7876 and 7877, was rendered March 17, 1943 (R. 710). The petition for rehearing in such appeals was seasonably filed by petitioners on March 31, 1943 (R. 723). The final decision of the Circuit Court denying the petition for rehearing and rendering final judgment was made January 21, 1944 (R. 944). The time for filing this petition did not begin to run until January 22, 1944 (*Morse* v. *The United States,* 270 U. S. 151; *National Labor Relations Board* v. *Mackay R. & T. Co.,* 304 U. S. 333, at 344); so that this petition is seasonably filed. The mandate of the Circuit Court has been stayed to permit the filing of this petition (R. 954).

Questions Presented.

(1) Which is the controlling lease or contract provision which has, since 1902, defined the expenses of Western Indiana to be paid by the five tenant owners on a wheelage basis and provided the method of apportionment thereof?

(a) Does the definition of such expenses in paragraph 6th of the 1882 Agreement still control, or has such provision been superseded and abrogated by the later definition contained in paragraph Ninth of the 1902 Agreement and paragraph 33 of the 1902 Lease and reiterated in five later leases?

(b) Does the method of apportionment of the wheelage expenses provided in paragraph 5th of the 1882 Agreement still control, or has such provision

been superseded and abrogated by the language in said paragraph Ninth and said paragraph 33 and reiterated in five later leases?

(c) Does paragraph 37 of the 1902 Lease relate to or in any manner affect paragraphs 5th and 6th of the 1882 Agreement?

(d) What is the effect of the acts and conduct of the parties subsequent to 1902 upon this fundamental question as to which is the controlling provision?

(2) If this Court should hold that paragraph Ninth of the 1902 Agreement and paragraph 33 of the 1902 Lease have been, since 1902, the controlling provisions defining expenses of Western Indiana to be paid on a wheelage basis and the method of apportionment thereof, do any or all of the expenses hereinbefore listed come within the scope of said definition?

(3) If this Court should hold that the definition of expenses in paragraph 33 of the 1902 Lease and the other provisions of said paragraph did not supersede and abrogate prior lease and contract provisions because of paragraph 37 of such 1902 Lease, and that paragraph 33 does not come within the scope of the exception, "except as herein otherwise specifically provided," in said paragraph 37, do any or all of the expenses hereinbefore listed come within the scope of the provisions of any of "said existing leases" defining expenses payable on a wheelage basis?

(4) If this Court should hold that paragraphs 5th and 6th of the 1882 Agreement are still in force and effect, do any or all of the expenses hereinbefore listed come within the definition of expenses payable on a wheelage basis in paragraph 6th?

(a) Even if this Court should hold that paragraph 6th is controlling, is the cost of acquisition of the additional property (the "disputed rentals" item) within the exception clause at the end of said paragraph?

(b) Are franchise taxes and federal income taxes of Western Indiana included within the scope of the definition in said paragraph 6th?

(5) Did the Circuit Court err in denying the petition for newly discovered evidence?

(6) In the event this Court should hold that paragraphs 5th and 6th of the 1882 Agreement are still controlling as to the payment of wheelage expenses, then the following questions, undecided by the Circuit Court, should be decided:

(a) Did the base provided in paragraph 33 of the 1902 Lease for determining the wheelage proportion of each of the five tenant owners change, modify or supersede the base for determining such proportion provided in paragraph 5th of the 1882 Agreement?

(b) In determining the wheelage proportion of each tenant owner, should the base include the wheelage of the Belt, the E. J. & E., and the Santa Fe?

(c) In determining such proportion of each tenant owner, should the base include the wheelage of Western Indiana?

(d) In connection with the suburban operation and freight switching activities of Western Indiana, should the gross expenditures in connection therewith or only the loss, if any, incurred in such operations (considered either in combination or separately) be billed by Western Indiana to the five tenant owners on a wheelage basis?

(e) Should Western Indiana's proportion of the common property expenses be included in its expenses of suburban operation and freight switching?

Reasons Relied On for Allowance of the Writ.

The petitioners seek a review by writ of certiorari of the decision and judgment of the Circuit Court for the following reasons:

I.

The Circuit Court reversed the judgment of the District Court upon a patently erroneous theory, originated by the Circuit Court itself, which was not shown by any of the pleadings, findings of fact, conclusions of law, opinion or decree of the District Court, not referred to in any Statement of Points on Appeal, and not contended for by appellants in the Circuit Court.

The Court construed paragraph 37 of the 1902 Joint Supplemental Lease, which reads as follows:

> "That nothing herein contained shall in any way alter, impair or affect *said existing leases*, or any or either of them, or any matter or thing therein, except as herein otherwise specifically provided." (Italics supplied.)

as referring to and including the 1882 *Agreement*, which no one claims is a *lease*, or, *a fortiori*, one of "said existing leases" referred to in paragraph 37. "Said existing leases" are specifically listed in paragraph 3 of the 1902 Lease; the 1882 Agreement is not even mentioned. Yet the Court held that the effect of this paragraph (37) in the 1902 Lease is to preserve paragraphs 5th and 6th of the 1882 Agreement. The Court not only treated the term "leases" as being synonymous with the term "agreement," but also treated the 1882 Agreement as though it was one of the leases listed in paragraph 3 of the 1902 Lease. Its entire decision and judgment was grounded on this erroneous interchange of the two terms and the fundamental misconception that the phrase "said existing leases" in paragraph 37 includes the 1882 Agreement.

In so deciding, the Court has so far departed from the accepted and usual course of judicial proceedings as to require an exercise of this Court's power of supervision.

II.

Proceeding upon its own erroneous theory that paragraph 37 of the 1902 Lease is controlling, the Circuit Court stated that the only question presented was "the effect of the 1902 Agreement (meaning lease) on existing leases" (parenthetical matter supplied). But, after posing this single question for its ultimate determination, the Court completely ignored it and never decided it. The Circuit Court thereby again so far departed from the accepted and usual course of judicial proceedings as to require an exercise of this Court's power of supervision.

III.

The Circuit Court has rendered two conflicting decisions in separate appeals from the same decree, upon the same stipulated facts and involving the same instruments. This is an even more serious conflict than one between the decisions of Circuit Courts of Appeal of different circuits.

The Court recognized that the fundamental question to be determined is, which are the controlling provisions as to the reimbursable expenses of Western Indiana and the method of apportioning them, viz., paragraph Ninth of the 1902 Agreement and paragraph 33 of the 1902 Lease, on the one hand, or paragraphs 5th and 6th of the 1882 Agreement, on the other. However, its decision in appeal No. 7878 was rendered on the theory that the 1902 Lease was controlling, whereas its decision in appeals Nos. 7875, 7876 and 7877 was rendered on the theory that the 1882 Agreement was controlling. Thus, its two separate decisions are

in irreconcilable conflict on the fundamental question involved.

Furthermore, the Circuit Court originally held (appeals Nos. 7875, 7876 and 7877) that the Grand Trunk payment was controlled by the 1882 Agreement, but in its final opinion of January 21, 1944 it confessed error as to this holding and decided that this item should be borne equally by the five lessees. Since the Court excluded the newly discovered evidence relating to this item, and there is no language in the 1882 Agreement excluding such item from the provisions thereof, this last decision must also have been made on the theory that the 1902 Lease was controlling. Hence, not only is there a conflict in the two decisions of the Court on separate appeals, but, in addition, there is a conflict in its two decisions on the same appeals.

IV.

In rendering separate decisions upon different appeals from the same decree predicated upon such conflicting theories, the Circuit Court has again so far departed from the accepted and usual course of judicial proceedings as to require an exercise of this Court's power of supervision.

V.

Although the third party complaint in this case sought a declaratory judgment adjudging and declaring the rights and liabilities of the parties as to all of the reimbursable expenses of Western Indiana and as to the proper method and means of apportioning the same among the parties liable therefor, several questions were left wholly undecided. These questions, although argued by the parties, have become important only as a result of the erroneous decision rendered by the Circuit Court on the fundamental and controlling question. The undecided questions have

been stated herein under "Questions Presented" (*supra*, p. 19).

Unless this Court corrects the fundamental error in the Circuit Court's decision, these undecided questions will inevitably result in further litigation among the parties.

If upon review this Court reverses the Circuit Court and corrects the basic error committed by it, all of these questions will disappear, and further litigation which would otherwise be engendered thereby will be avoided, with resultant saving of both time and labor to the courts.

Petitioners respectfully request this Court to exercise its power of supervision and allow the writ so that these questions will be completely and finally settled.

VI.

In considering the foregoing reasons for the allowance of the writ, petitioners respectfully ask this Court to take into consideration the importance of this case. The decision of the Circuit Court, involving as it does a determination of the liabilities of these five interstate railroads with respect to expenses relating principally to their common Chicago terminal under the leases and contracts involved herein, has imposed upon the five lessee railroads the burden of paying on a wheelage basis practically all of Western Indiana's expenses involved in the appeals hereby sought to be reviewed, contrary to the decision of the District Court, which held none of such expenses so payable.

These expenses will continue to be so payable for more than 950 years and will aggregate hundreds of millions of dollars; and, unless the fundamental error in the decision of the Circuit Court as to which is the controlling instrument is corrected by this Court, such error will be perpetuated for more than 950 years to come.

The case is of such importance as to warrant the exercise by this Court of its power of supervision.

WHEREFORE, petitioners respectfully pray that a writ of certiorari be issued out of and under the Seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send up to this Court, on a day to be designated therein, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals had in this case, to the end that this case may be reviewed and determined by this Court; that the decision and judgment of said Circuit Court of Appeals of March 17, 1943, in Nos. 7875, 7876 and 7877, and the order of said Court of January 21, 1944, so far as it denied the petition for the admission of newly discovered evidence and the petition for rehearing, be reversed and the decree of the District Court be affirmed; and that your petitioners be granted such other and further relief as may seem proper.

Respectfully submitted,

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY,
Petitioner,

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K. L. RICHMOND,
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WABASH RAILROAD COMPANY,
Petitioner.

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APPENDIX.

OPINION OF THE CIRCUIT COURT OF APPEALS.

Nos. 7875, 7876, 7877.
October Term, 1942, January Session, 1943.

March 17, 1943.

Before EVANS, SPARKS, and MAJOR, *Circuit Judges.*

EVANS, *Circuit Judge.* These four appeals were consolidated for presentation. They raise somewhat similar questions. Three, Nos. 7875-7, may be disposed of in one opinion. The appeal in No. 7878 must be separately considered and will be treated in a separate opinion.

Generally speaking, all the appeals involve the distribution of the obligations and the maintenance and operating expenses of the Chicago and Western Indiana Railroad Company, herein called the Western Indiana, which was organized in 1879, to provide terminal facilities for use by such railroads as might become its lessees. Western Indiana holds the legal title to what is known as the old part of the Dearborn Street passenger station, and general facilities, with the land, and approximately 25 miles of first or main-line railroad tracks and other tracks called second, as well as other property.

It entered into 999 years leases with five lessees: (1) Chicago and Erie Railroad Company, here called the Erie, appellant in No. 7878; (2) The Grand Trunk Western Railroad Company, here called the Grand Trunk, appellant in No. 7875; (3) The Chicago, Indianapolis and Louisville Railway Company, here called the Monon, appellant in No. 7876; (4) The Chicago and Eastern Illinois Railroad, herein called the Eastern Illinois, and (5) The Wabash Railway Company, hereinafter called the Wabash. The two last-named lessees are the real adversary parties to appel-

lants in Nos. 7875 and 7876. The other lessees oppose Erie in its contentions in No. 7878.

Western Indiana is appellant in appeal No. 7877. It seeks instruction and guidance in making its future rental charges.

The litigation started as a so-called friendly suit, brought by Western Indiana, against Erie, to recover what Western Indiana alleges, and Erie denies, is rental due as Erie's unpaid, proportionate share of certain costs and expenses incurred by Western Indiana during the period, April 1, 1933, to December 31, 1938.

Allegedly due on this amount was $114,071.14. Erie denied all liability and filed a counterclaim, alleging that it had overpaid its share of the rentals and sought judgment for the amount of said overpayment, amounting to $126,-852.72 on the so-called management issue and for $121,-804.97 on the disputed rental issue.

Erie also is a stockholder of plaintiff. It assails Western Indiana's action in refusing to curtail certain suburban services which it is operating at a loss of $100,000 a year, after five of the six directors of plaintiff's board voted in favor of curtailment.

Erie's counterclaim against Western Indiana caused the latter to bring in the Grand Trunk, the Monon, the Eastern Illinois, and the Wabash, and ask the court to adjudge and declare the rights and liabilities of all such parties with respect to Western Indiana's operating and working expenses under the various leases to these parties. It also sought a declaratory judgment which would be its guide for distribution of its future rental charges. The new parties defendant deny liability. Grand Trunk and Monon each filed cross claims and counterclaims and asked for an accounting. All the bars were now down. The litigation provided a field day for all parties who entered their favorites,—dark horse grievances.

A further statement of the issues can best be understood if a short resumé of the Western Indiana's history and activities is given. Organized in 1879, for the purpose of constructing a line of railway from Indiana State Line and also from Dolton, Illinois, into the City of Chicago, and there providing terminal facilities for use in common by Eastern Illinois and such other railroads as might become its lessees, the first stage of its construction was completed

in 1880, since which time it had been the owner of a terminal in Chicago and two main lines of tracks between this terminal and the State Line near Hammond, Indiana, and the other at Dolton, Illinois. In addition to these two short main lines, Western Indiana owns "tracks, switches, turnouts, side tracks, yards, stations, appendages, and terminal facilities" comprising what is known as its "common property."

Since 1880, additions and betterments to the common property in the way of improvements have been made. It has raised its tracks; it has also acquired what is known as the Belt Division and also various tracks, yards, and facilities not included in the "common property."

Between October, 1879 and December, 1881, Western Indiana granted five, generally similar, leases, each for 999 years to the five above-named lessees, or their predecessors. The first lease was to Eastern Illinois. Each lease granted exclusive right to use certain described portions of the terminal property and also the right to use, in common with Western Indiana and such other company or companies as might obtain from Western Indiana the grant of similar rights, all the specified portions of the main tracks, passenger depot, and appurtenances.

The lease to Eastern Illinois gave it the exclusive right to conduct the entire local business between Chicago and Dolton. The lease to Erie gave Erie a similar right to the local business between Calumet River and Hammond, Indiana.

Each lease provided that each lessee should pay $5 per year, and such sum as would pay the interest upon the Western Indiana's mortgage and provide sinking funds for the payment of the principal in 35 years from January 1, 1885. Said lease also provided for the lessee's paying taxes and assessments, as well as all expenses of maintenance, management, and operation.

The different bases of rent payment are what has led to conflicts, disputes, and to litigation. Four times these disputes have reached this court. (131 F. 2d 215; 94 F. 2d 296; 86 F. 2d 441; 141 F. 785.)

Each time a different phase of the ever-hot and burning controversy was involved.

Rental payments were determined in one of two ways: either on the basis of use which was measured by the ratio

of engine and car use of the property by one lessee to the total engine and car use of all five lessees. This was called the wheelage basis. The other rental called for payment by each lessee equally.

While the Western Indiana was originated as an independent venture, the stock of the company was soon acquired by the five lessee railways, each of which owned 20%. Such ownership has continued in the same ratio since 1882. About that same date an agreement was made, known as the 1882 Inter-Tenant Agreement, which provided that Western Indiana should exclusively manage and control all the property used by Western Indiana and its five lessees; should furnish at cost all facilities and perform all services required by it and as defined in the Inter-Tenant Agreement. Some expenses were to be distributed on the wheelage basis. Other expenses were to be borne equally by the owner-tenants. For exact coverage, read the provisions hereafter quoted.

The original bond issue was supplemented by a new bond issue when a new passenger station and additional track were constructed and numerous betterments were made which resulted in a new agreement executed in 1902, the terms of which and their effect on the 1882 Inter-Tenant Agreement are of large, if not determinative, importance in the disposition of these appeals. A new consolidated mortgage for $50,000,000 was negotiated. The five lessees executed an agreement which provided for the issuance of the mortgage and bond issue and "for the execution of new contracts of leasing," all to be embodied in one document. The joint supplemental lease bore date, July 1, 1902, and carried into effect this preliminary agreement of the tenants. It provided for the refunding of the bond issue, the payment of rentals, and other matters of no particular importance in this case.

One paragraph of large importance is No. 33. It is set forth in the margin.* Beneath it is paragraph 6 of the

* "33. Operating Expenses Divided on Wheelage] Eleventh. That after the date hereof the lessor shall exclusively manage, operate and maintain every portion of the common property; and the entire cost of the management, operation, maintenance, repair and renewal of, and of all taxes, liens, water rents and assessments on, said railroad, buildings and facilities, the common use of which is reserved to the parties hereto, and the entire cost of the management, operation, maintenance, repair and renewal of, and all taxes, liens, water rents and assessments on, all enlargements and improvements thereof and additions thereto and on and to any other railroad hereafter acquired by the lessor for the common use of

Inter-tenant Agreement of 1882.** These two afford the *pièce de résistance* of this suit.

Since 1902, additional bonds have been issued and the lessees have, through additional leases, obligated themselves to pay additional rental, that interest and principal on the bonds may be always paid.

The property of Western Indiana is used in part by other railroads. At the present time they are three in number,—the Belt Railroad, the Atchison, Topeka and Santa Fe Railway Co., and the Elgin, Joliet and Eastern Railway Company. It has also rented properties, nine parcels, paying therefor, $90,084.25 per year.

The business of the five-owner-lessees developed somewhat differently, and the rental payments on the wheelage basis began to vary. As a result, it became a matter of

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the parties hereto, shall be borne by said lessees in the proportion of their several wheelage uses of the various portions of said railroad to the total wheelage use thereof; and for the purpose of distributing such cost, the lessor shall divide by lines across and at right angles with its right of way, its said railroad and property, including all appurtenances, into such sections as may be necessary in order to equitably distribute such cost of the management, operation, maintenance, repair and renewal of, and all taxes, liens, water rents and assessments on, said several sections among the parties of the second part in proportion to their respective wheelage uses of such sections; and it may, from time to time, change such sectional divisions the better to subserve the purpose and intent aforesaid."

** "6th. The term, 'working expenses,' as used in this agreement, shall include all taxes and assessments, ordinary and extraordinary, against the property of the Western Indiana Company, except that leased as aforesaid to the said Belt Railway Company, and property leased, or that may be leased, exclusively to one of the parties of the second part, or some other company or person; the cost of maintaining, repairing and renewing its railroad, tracks, buildings and other property, in the common use of the parties of the second part; the expense of providing and maintaining gates, signals, semaphores and lights, and of complying with any and all requirements that may be imposed by national, state or municipal authority; the expense of all service which the Western Indiana Company may have to employ; the cost of maintaining its corporate organization, and of protecting and defending its property, including suitable insurance thereof; all judgments against the Western Indiana Company and the expense of litigation, and *all other claims and demands of every name, nature and description*, for which the Western Indiana Company may be legally liable, excepting its mortgage debt and the interest thereon, and excepting therefrom, and from all the provisions of this paragraph, such claims and demands as, under this agreement, or the leases and supplemental leases between the Western Indiana Company and the several parties of the second part, should be paid exclusively by one of the parties of the second part. The cost of permanent improvements and of additions to the Western Indiana Company property shall not be deemed to be included in the term 'working expenses' as used in this paragraph." (Italics ours.)

advantage to one tenant to pay its rental on the wheelage basis, while to another, an advantage lay in payment on an equal basis.

A by-law of Western Indiana provided:

"A. In the management and control of the railroad and property of the Company which is used in common by the present five railway company lessees thereof, * * * and in the establishment and enforcement of rules and regulations for the use of said railroad property, it shall be necessary to secure the *unanimous* approval of said railway company lessees."

Various efforts to effect a compromise were defeated by the spokesmen of one or more tenants. Auditors and Committees of Advisors made reports as to the correct method of determining whether an item fell within the wheelage proviso, but all reports came to naught for want of unanimous approval. The lessee or lessees who were benefited by the prevailing method of distributing expenses blocked all possible proposed settlements and attempted clarifications. The lessor was not consistent or uniform in its rulings. In one instance a substantial item was allocated first on a wheelage basis, then on an equal basis, then back to the wheelage basis.

The items which are involved in the appeal of Grand Trunk and Monon, are four in number: (1) disputed rentals; (2) the Grand Trunk payment; (3) Western Indiana's separate railroad operations; (4) miscellaneous charges and expenses.

(1) The Western Indiana leased nine pieces of property and paid rental therefor. The largest rental item was $48,718.72, paid annually to Santa Fe. For the remaining eight parcels, a rental of $41,365.72 was paid to the five shareholder-lessees in different amounts.

(2) An annual payment of $20,665.35 by Western Indiana has been made to Grand Trunk since July 1, 1902, and was to continue until "Grand Trunk shall use lessor's road south of 49th Street." (Such use by Grand Trunk has not occurred.) This agreement and payment were the result of certain cancelled provisions in the 1891 lease to Grand Trunk.

(3) Lessor incurred expenses for two services—suburban passenger train service and freight switching. Both

are conducted on the common property. The expenses have been heretofore paid out of lessor's income. In other words, they have not been billed separately to and paid by the lessees.

(4) Charges and expenses for "Foreign Freight Cars —Per Diems, Reclaims, and Repairs; Illinois Franchise Tax; Federal Income Tax; Miscellaneous Taxes; Work Equipment — Insurance, Depreciation and Repairs; Expenses on Funded Debt; and Taxes on Surplus Property."

The contested question in each case turns on the query,— How should these expenses be distributed, on a wheelage basis, or equally?

Preliminary questions which are advanced by opposing counsel must first be met.

Much weight is given by Grand Trunk and Monon to the decision of this court in a case (94 F. 2d 296) brought to determine whether certain capital stock taxes should be distributed upon the wheelage basis. Without discussion, we accept, not because of any doctrine of *stare decisis*, but rather because of the strength and merit back of the reasons and conclusions, that part of the opinion which holds that the lessees are not bound or estopped by their payments to the lessor nor is the lessor bound by its construction of the contract and method of distribution of expenses.

The venture of the lessor and lessees was quite similar to, if indeed it was not, a joint venture. The many items of expenses of the lessor necessitated prompt payments by the lessees. Adjustments could be, and were, made by both sides. None of the parties ever made their payments as a settlement of a stated account. In fact, the lessor occupied somewhat the position of a trustee. (*Grand Trunk Ry. Co.* v. *Chicago & W. Ind.*, 131 F. 2d 215.)

We are also convinced that if the Inter-Tenant Agreement of 1882 governs, the items here in dispute are chargeable to tenants on the usage or wheelage basis.

Supplementing the reasons given by the court in the capital stock tax case, we find much justice and persuasive reason back of such an allocation. When the five roads, which were to use these terminal facilities of Western Indiana concluded to embark on this enterprise and to purchase the property, each contributed the same sum and each took 20% of its stock and each acquired a lease

with the right to use the common property for a period of 999 years. Each was to pay a rental to cover the charges.

The difficult task of distributing the expenses and charges arose. It was to be done as rentals. Being equal owners, the parties might have provided for carrying the burden of all expenses, equally. Likewise, the burden could have been distributed among the owner-tenants on the basis of their use of the property. The parties adopted neither in whole and both in part. This not only would appear to be the fair way, but the parties so believed and settled the matter by their written agreement. This was in 1882.

As the five roads' businesses increased and the Chicago terminal became more important and valuable, costly improvements and betterments were required. In twenty years this led to the flotation of a $50,000,000 mortgage and the execution of an agreement to give assurance of interest and refunding payments and to make the bonds sufficiently attractive to insure a low rate of interest.

The fundamental basis for distribution of Western Indiana's costs, however, remained the same. The tenant was to pay in accordance with the extent of his use, save where the investment improvement and some similar items justly required the owners to pay according to their holdings in the company's equity.

Concluding as we do that all four items, rental, Grand Trunk payments, Western Indiana's separate railroad operation, and each miscellaneous charge and expense, would, under the agreement of 1882, be items for which the lessees should pay on a user or wheelage basis,* we come to the seriously argued question in the case. It is the ground upon which appellees must rely in order to prevail, *i. e.*, the cancellation (or abrogation) of the 1882 agreement by the 1902 agreement.

Appreciating the importance of this fact, the District Court met the question squarely and, by its 3rd conclusion of law, declared provision of paragraph 9 of the Preliminary Proprietary Agreement and paragraph 33 of the Joint Supplemental Lease of July 1, 1902, "superseded and abrogated paragraphs 5 and 6 of the Inter-Tenant Agreement of November 1, 1882," and the various provi-

* For a telling statement of the reasons why we so conclude, see Judge Lindley's opinion in 94 F. 2d 296.

sions in prior leases, etc. The District Court concluded that the Inter-Tenant Agreement of 1882 and the 999 year leases, so far as they provided for rental on a wheelage basis, were cancelled and the new agreement narrowed in scope the services for which rental on a use or wheelage basis was payable.

Grand Trunk and Monon contend that this is at variance with the decision of this court in the capital stock tax case. They also argue that this conclusion is in direct contradiction to the provision of paragraph 37 of the 1902 agreement, which reads:

"That nothing herein contained shall in any way alter, impair, or affect said existing leases, or any or either of them, or any matter or thing therein, except as herein otherwise specifically provided."

It would have been easy for the parties to have expressly cancelled the rent provisions of the leases and particularly paragraphs five and six of the Inter-Tenant Agreement of 1882, if such were the agreement of the parties. Instead, however, the 1902 agreement, which appellees rely on as a cancellation of the 1882 agreement, expressly provides that the existing leases were in no way *altered, impaired or affected,* "except as herein otherwise specifically provided."

An agreement referred to by counsel and by the District Court, which preceded the execution of this 1902 agreement, was called the "Preliminary Proprietary Agreement." It was executed, January 16, 1902, and obtained its name, Preliminary, because it was the forerunner,—the basis—of the ultimate agreement into which it merged when the 1902 agreement was executed, July 1, 1902. It added nothing to the terms or the effect of said July 1, 1902 agreement. Consequently there is presented only the effect of the 1902 agreement on existing leases. The same question was before us in the capital stock tax case.

In view of the express provision above quoted, to the effect that no impairment, no alteration, and no effect of existing leases occurred by virtue of this, the 1902 agreement, "except as herein otherwise specifically provided," we must reject the contention that there was "a cancellation" or "an abrogation" of paragraphs 5 and 6 of the 1882 agreement by the July 1st, 1902 agreement.

This conclusion being inescapable, we must read and

give effect to paragraph 33 to ascertain the extent that the existing leases were by it otherwise specifically superseded.

In describing the working expenses for which the parties were liable on a wheelage basis, paragraph 6 of the 1882 agreement provides:

"The term, 'working expenses,' as used in this agreement, shall include * * * all judgments against the Western Indiana Company and the expense of litigation, *and all other claims and demands of every name, nature and description,* for which the Western Indiana Company may be legally liable, excepting its mortgage debt and the interest thereon, and excepting therefrom, and from all the provisions of this paragraph, such claims and demands as, under this agreement, or the leases and supplemental leases between the Western Indiana Company and the several parties of the second part, should be paid exclusively by one of the parties of the second part. * * *" (Italics ours.)

This italicised provision does not appear in paragraph 33 of the 1902 agreement. Specifically, the question is,—Should we, in view of paragraph 37 (1902 agreement) heretofore quoted, which retained in full force and effect every provision of the existing leases ("or matter or thing therein") not "herein otherwise specifically provided," hold that this provision of paragraph 6 was cancelled? We had occasion to discuss the same subject in the capital stock tax case and concluded that this agreement, appearing in paragraph 6, remained intact after the 1902 agreement. We can not see how any different conclusion could have been reached. Paragraph 37 of the 1902 agreement expressly covers the situation. The quoted agreement appearing in paragraph 6 does not come within the exception of paragraph 37. It therefore clearly follows that the lessees are all bound by the above-quoted provision of section six and must pay the expenses, such as rent and other items which are the subject of this litigation, on a wheelage basis.

In disposing of this case we have given scant attention to the application of the doctrine of *stare decisis.* We have expressed our views on the effect to be given to the rules of *stare decisis,* "law of the case," and *res adjudicata,* in *Luminous Co.* v. *Freeman Co.,* 3 F. 2d 577. Counsel for appellants in Nos. 7875-6 have insisted that this

case is governed by the decision of this court in *In re Chicago & E. I. Ry. Co.*, 94 F. 2d 296.

It is not to be understood that we are indifferent to the rule of *stare decisis*. In view of the earnest contention of the parties, their relations to each other, the evident desire of Western Indiana and at least some of the other lessees, to keep this large and important venture operating justly and fairly, we have felt it wise to reconsider the questions and, irrespective of the capital stock tax decision, reach an independent conclusion.

Our conclusion is that paragraph 37 of the 1902 agreement is express and explicit in its terms. That paragraph makes it impossible for us to conclude that the agreement of 1902 abrogated the previous existing agreements or rights of the lessees. On the other hand, that paragraph expressly sustained all existing contract rights not specifically changed. Among such rights was the lessees' right to have certain expenses paid on the wheelage basis. Included within the terms of the provision which called for payment on wheelage basis was "any and *all other claims and demands of every name*, nature and description for which the Western Indiana Company may be legally liable."

The decree of the District Court is reversed with directions to enter one in accordance with the conclusions expressed in this opinion. The Western Indiana should be granted a decree instructing it to allocate expenses in so far as the items here involved are concerned, among the lessees on a wheelage basis. The decree to be entered should provide that Western Indiana should restate its account charging some of the lessees with the difference between what they have paid and what they should pay on a wheelage basis, and crediting others with the difference between what they have paid on an equal basis, and what they should have paid on a wheelage basis. The decree will be subject to a further modification if there be any alteration or change in the method of apportioning expenses to be distributed on a wheelage basis if the appeal in No. 7878, *Erie Railroad* v. *Western Indiana*, necessitates or directs a modification of existing methods.

OPINION OF THE CIRCUIT COURT OF APPEALS.

No. 7878. October Term, 1942, January Session, 1943.

March 19, 1943.

Before EVANS, SPARKS, and MAJOR, *Circuit Judges.*

EVANS, *Circuit Judge.* This is a companion appeal to Nos. 7875-7, disposed of March 17, 1943. The facts set forth in that opinion and the statement of this court in its opinion in In re C. & E. I. Ry. Co., 94 F. 2d. 296, furnish additional background for the issues here presented. The parties will be named as in the companion cases.

Here, as there, the controversy arises out of agreements made by the Western Indiana and its five co-owner lessees and deals with so-called management costs and working expenses of this terminal railroad.

Western Indiana brought suit against Erie to recover what it asserted was an unpaid portion of Erie's share of management costs. Erie answered and counterclaimed, setting forth that it had paid more than it should have paid, and demanded judgment for the overpayments. It also asked that it be not required to participate in the operation of the suburban service of Western Indiana, which has been and is conducted at a loss. Judgment was rendered against Erie in favor of Western Indiana for the sum of $114,071.13 on the management, and for $42,467.87 on the disputed rental, issues.

Erie seeks to reverse this judgment and to recover $125,229.67 for overpayment of management or general overhead cost. While some of the questions determined in appeals Nos. 7875, 6, 7 are considered by counsel in their briefs on this appeal, we will refrain from considering or again stating the facts which furnished the background for the disposition of those appeals.

Two separate and distinct questions are presented by

Erie. One involves the relief by it sought in respect to the operation of the losing suburban business by Western Indiana. The other question is the method of distributing the entire cost of "management operation, maintenance, repair, and renewal of, and taxes, liens, water rents, and assessments on Western Indiana Railroad buildings and facilities." The second question covers not only the money judgment entered in favor of Western Indiana against Erie, but the sum demanded by Erie on its counterclaim.

Erie contends that rentals based on a user basis can not be determined by the wheelage basis alone. The user basis, supplemented by the division of the railroad property into sections, requires not only the determination of the amount of use as measured by cars and engines, but calls for consideration of the character of the use by sections. In other words, Erie asserts that these sharp variations in costs and proportions of user services in the different sections, necessitate attention to sections as such.

The cost of operation varies when measured by engine or car miles, due principally: (a) to services for passenger station and coach switching exclusively for passenger traffic; (b) to other special services for both passenger and freight traffic at the north end of the common property; (c) to a smaller volume of traffic on some portions than on others.

Erie illustrates the unjust distributions of a uniform rate, a rate which ignores section lines, by taking a single mile in one section and comparing it with a mile operated in another section. It asserts that Western Indiana charged at a rate of $1.63 a mile for miles run in Dearborn station "A" while the cost of materials and labor amount to $1.90, whereas the material and labor cost was less than 3¢, south of 55th Street.

More specifically it may be said that Erie predicates its argument on the July 1st, 1902 agreement, which is one agreement where the 1882 inter-tenant agreement is specifically changed.

Paragraph 33 specifically provides (contrary to the 1882 agreement) for the creation of sections as units of use by different railroads. The particular clause here involved reads as follows:

"* * and the entire cost of the management, * * * shall be borne by said lessees in the proportion of their

several wheelage uses of the various portions of said railroad to the total wheelage use thereof;
"and for the purpose of distributing such cost, the lessor shall divide by lines across and at right angles with its right of way, its said railroad and property, including all appurtenances, into such sections as may be necessary in order *to equitably distribute such cost of management*, operation, maintenance, repair and renewal of, and all taxes, liens, water rents and assessments on, said several sections among the parties of the second part in proportion to their respective wheelage uses of such sections;
"And it may, from time to time, change such sectional divisions the better to subserve the purpose and intent aforesaid." (Italics ours.)

A chart showing how plaintiff's property is divided into sections is a part of the record. It is not denied (as Erie contends) that certain sections do not require the same amount of management expense as other sections. It is not questioned, but that the heavy management expense is either at Dearborn Station "A" or Dearborn Station "B." One section includes Dearborn Station "A" and the railroad tracks for about half a mile south of it. The railroad tracks require but a small part of the cost for the station services as a whole. The charges for such cost of material and labor for this station are placed against the users and based on the number of engines and cars leaving the station. The user's apportionment of its general overhead costs is based on the total engine and car miles run on the common property. Approximately 99% of such miles were outside of the station section and consisted chiefly of miles run of freight traffic, which did not use the passenger station or call for the extra services incident to passenger business. It cites a single month where the actual cost charged was computed and found to be $172 for management, whereas the expense (labor and material) was a hundred times that amount. It could hardly be otherwise.

But the vital question is,—did the parties by their agreement provide for a division on a section basis, so as to adjust—in part at least—what is apparently an injustice (due to changes in amount and character of business done by the lessees) if user's service is determined by wheelage on all the common property? If the parties have not so agreed, the courts can give the aggrieved lessees no

redress. On the other hand, if the agreement permits of more equitable adjustment of this item among lessees, based on section consideration, we are not inclined to give much heed to action forced on Western Indiana by one tenant who is relying on an unfortunate by-law which requires unanimous vote to make a change in the agreement.

Basically the question is whether Western Indiana, in apportioning management costs on a user basis, has made, and is making, a proper apportionment of such costs, in view of the contracts which govern the subject.

Erie asserts that plaintiff does not make any charge against the units of service for managing its production, nor does it require its users to pay a share of the general overhead cost of service based on management work done in producing it. It apportions such cost at a uniform rate per mile of movement of engines and cars by its lessees for all of the common property, and for that purpose it keeps an account of engine and car miles run by its lessees on the common property. All items of cost other than such as are assigned to some one section and property taxes, are designated as "management" cost and charged to the users of the common property in the proportions which their engine and car miles bear to the total engine and car miles. The freight traffic, for which practically no special services are furnished, is charged the same rate per mile as the passenger traffic which receives terminal station and other special services. In other words, the charge is that in apportioning the general overhead cost the sections are disregarded and serve no purpose and the variation in cost from section to section is not considered.

Without elaborating the details showing the injustices that follow the practice of ignoring the sections and the character of the service rendered therein, it is, we think, sufficient for our conclusion to determine the purpose of the provision in the agreement which specifically dealt with *sections, as such*, and construe and apply such above-quoted provision.

We fail to understand why this agreement, which changed the existing agreement, was inserted, unless the parties contemplated, and intended, adjustment of management expense on the basis of kind of use which took place in the different sections. The difference between that section which contained the depot and the sections which marked the boundaries of a part of the freight yard, is so obvious

that it is hardly conceivable that the lessees should ever have agreed to a division of said cost on any basis which did not take into consideration the kind of service demanded and rendered, as well as the extent of such use. For the kind of use determined the kind of service Western Indiana rendered, and it in turn measured the cost of such service.

The agreement expressly provided that it was *"for the purpose of distributing such costs"* of management operation, maintenance, etc., that the "lessor shall divide its railroad property *into sections*" by lines which ran across and at right angles with its right of way. Moreover, it expressly provided that Western Indiana might "from time to time, change such sectional divisions *to better subserve the purpose and intent aforesaid.*"

Clearly, this intention was *to more equitably distribute the management costs.*

If all lessees made like use of the common property, there would be no basis for complaint. But where variances existed in lessees' passenger and freight business, the adopted method could not be equitable and just.

In view of the results, we can see no reason for sustaining a practice which wholly ignored the agreement which provided for a division of the common property into sections. We can see no reason for dividing the property into sections, save as a practical matter, the kinds of services varied, the costs thereof varied, and the parties wanted to apportion the costs as fairly as possible, and the sectional basis promoted equitable distribution of costs.

The only reason that seemingly is advanced in opposition to Erie's contention is that the practice has been long continued. This objection, we rejected in the capital stock tax case. In other words, recovery was not barred by voluntary payment in such a case. In the companion cases we reached the same conclusion. We reaffirm it here.

It follows that apportionment of management costs as now and heretofore made, can not be sustained.

The money judgment against the Erie, in favor of Western Indiana, must be, and is, reversed. However, it does not follow that judgment should be directed in favor of Erie for the amount it claims to have overpaid, towit, $125,229.67. Inasmuch as the District Court decided it was not entitled to recover at all, the court did not pass

upon the items which make up this amount. Likewise, there may be issues not presented to us, such as estoppel, laches, or the statute of limitations, which have not been passed on by the District Court, and which may have a bearing on the right of Erie, or the amount which Erie may recover for overpayment of management or general overhead costs.

Respecting Erie's right to be relieved from the expense of the unprofitable operation of Western Indiana suburban business, we are not satisfied from the record before us as to the origin of this service. We do not know whether it was rendered as a part of the Western Indiana's duty as a common carrier or whether it was ordered either by the Illinois Commerce Commission or the Interstate Commerce Commission. Moreover, it may be that the service can not be discontinued, without consent or approval of one of these bodies. On the showing before us, we are not prepared to grant the relief sought. Its denial will be without prejudice.

The judgment of the District Court is reversed, and the cause is remanded with instructions to dismiss the action of Western Indiana against Erie and to take such further evidence as may be necessary to determine whether the Erie shall recover on its counterclaim, and, if anything, the amount thereof.

OPINION OF THE CIRCUIT COURT OF APPEALS.

Nos. 7875, 7876, 7877, 7878.
October Term, 1943, January Session, 1944.

January 21, 1944.

Before EVANS, SPARKS, and MAJOR, *Circuit Judges.*

EVANS, *Circuit Judge.* The Chicago & Eastern Illinois Railroad Company and the receivers of the Wabash Railway Company have filed a petition for rehearing, and later asked leave to adduce additional evidence, either before this Court or the District Court, to support their construction of the leases and contracts which are the subject of this litigation. Also, there is before us, a motion of the Chicago and Erie Railroad Company to set aside and vacate the order entered by this court, September 27, 1943, recalling the mandate, and a motion that the mandate stand as originally issued, in No. 7878.

This mandate was recalled on the theory that if the so-called newly-discovered evidence should affect the outcome of the appeals in Nos. 7875-7877, there might be a different conclusion than that reached in the opinion which was heretofore filed by us in No. 7878, and which was not attacked by petition for rehearing. A mandate in No. 7878 had been duly issued, but was recalled when the application for leave to present newly-discovered evidence was filed.

To support their application for leave to present newly-discovered evidence, petitioners assert that in the trial of this case they stipulated as to important facts, all parties being on a friendly basis and all seeking to avoid unnecessary expense and delay. However, petitioners assert that, through no want of diligence, they failed to discover certain enlightening contemporaneous stenographic records of meetings and other documents which led up to the 1902 written agreement, which evidence clarifies the intention of the parties. They assert such evidence would affect the conclusion which we reached as to the proper construction

of the agreements which determine the various issues presented by this litigation. They ask that opportunity be given to them to present this evidence either to this court or to the District Court.

In opposition to this application, two of the lessees challenge both the admissibility and the persuasiveness of this evidence. Also challenged is the procedural right of applicants to present, at this late date, any motion for modification of the decree, or for a new trial because of the discovery of new evidence. These objectors contend that under the Rules of Civil Procedure, newly-discovered evidence may be presented only up to the "expiration of the time for appeal," (Rule 59), and they also charge that the procedure for filing of a bill of review on the basis of newly-discovered evidence no longer obtains. The argument is advanced that since the time under Rule 59 expired in September, 1941 —when the time for appeal would have expired—the petitioners were without right, and this court without jurisdiction, to permit the introduction of this newly-discovered evidence, either in the District Court or in this court.

We reject this contention and hold that where an appeal is taken, Rule 59 does not bar the party from making application to the Circuit Court of Appeals for leave to present newly-discovered evidence.

The particular language of the rule which limits the moving party to the date of the expiration of the time for appeal, is significant. It is the time within which an appeal may be taken which marks the limitation for presentation of newly-discovered evidence to the District Court. If an appeal is taken, it transfers to the appellate court the disposition of the application. *Hazeltine Corp.* v. *Wildermuth*, 35 F. 2d. 733; *Boro Hall Corporation* **v.** *Gen. Motors Corp.*, 130 F. 2d. 196; *Rome Grader & M. Corp.* v. *Adams Mfg. Co.*, 135 F. 2d. 617; *Gairing Tool Co.* v. *Eclipse Co.*, 48 F. 2d. 73.

This court in *Rome Grader Corp.* v. *Adams Mfg. Co.*, 135 F. 2d. 617, had a somewhat similar application before it. Our right to grant the motion was apparently recognized, and the showing which the moving party must make, was stated as follows:

> "To secure a rehearing on newly discovered evidence, two questions must be answered affirmatively: * * * (1) Has plaintiff exercised due diligence at all

times in its efforts to secure the newly discovered evidence? (2) Will such evidence be of such weight or importance as to necessitate a different conclusion? If either of these questions can be answered in the negative, the motion must be denied."

Two requirements are emphasized: (1) diligence, and (2) convincingness of the newly-discovered evidence.

While diligence is shown, we are satisfied that the newly discovered evidence here submitted would not have justified a different conclusion. Examining this evidence carefully, we find it was a record of contemporary action of officers and attorneys for the lessees, when discussing and proposing changes in the terms of the written agreements. As we view it, the written agreement in question is not ambiguous, but is clear and calls for no explanation or enlightenment and surely no modification by the court. Moreover, a study of this evidence fails to substantiate the claim that the parties actually intended to apportion certain items of cost on an equal basis, rather than upon the wheelage basis. We must, and do, deny the application for leave to offer this newly-discovered evidence.

Upon the petition for rehearing on the merits of this question, we are convinced, from further study, that we erred in one respect, namely, in the distribution of the $20,665.35 annual payment to Grand Trunk Railroad.

While the argument which led to the conclusion in our opinion, here under review, to the effect that this item, like the others, should be paid for on a wheelage basis, has support, there are, in the applicable written contracts and leases, provisions as to this item which control, and they require this item of cost of operation to be paid by the lessees on an equal basis.

Undoubtedly the parties were moving toward an apportionment of the cost on a wheelage basis. This was, of course, equitable and just. Great, and almost unbelievable, had been the growth of this enterprise in twenty years. However, there was an acknowledged, written exception to this method of distributing lessor's costs and expenses. The close and narrow question which was presented, and upon which we reached a conclusion which we now believe was erroneous, was this—Did the item of $20,665.35 payable to Grand Trunk fall within the provision for working ex-

penses, or was it a capital cost item to be met by the lessees on an equal basis?

We are indebted to counsel for giving us an opportunity to correct the erroneous conclusion which we reached, and to acknowledge our error.

The opinion heretofore rendered is modified to the extent that this item of $20,665.35 payable annually to the Grand Trunk Railroad shall be apportioned by Western Indiana among its lessees on an equal basis. In all other respects, the petition for rehearing and the motion for leave to offer newly-discovered evidence are denied. The costs of the appeals in Nos. 7875-7876 and 7877 shall be borne equally.

In No. 7878, the order recalling the mandate is vacated.

OPINION OF THE DISTRICT COURT, RENDERED ORALLY.

June 17, 1941.

BARNES, *District Judge:*

"In telling you what I think of this case, gentlemen, I confine myself generally to statements of conclusions respecting the several principal issues in the case.

"The first principal issue which had the consideration of counsel was the so-called management expense issue. The question there arises under Section 33 of the Joint Supplemental Lease of July 1, 1902. It is there provided:

> " 'That after the date hereof the lessor shall exclusively manage, operate and maintain every portion of the common property; and the entire cost of the management, operation, maintenance, repair and renewal of, and of all taxes, liens, water rents and assessments on, said railroad, buildings and facilities, the common use of which is reserved to the parties hereto, and the entire cost of the management, operation, maintenance, repair and renewal of, and all taxes, liens, water rents and assessments on, all enlargements and improvements thereof and additions thereto and on and to any other railroad hereafter acquired by the lessor for the common use of the parties hereto, shall be borne by said lessees in the proportion of their several wheelage uses of the various portions of said railroad to the total wheelage use thereof; * * *'

"It is further provided in that paragraph:

> " '* * * and for the purpose of distributing such cost, the lessor shall divide by lines across and at right angles with its right of way, its said railroad and property, including all appurtenances, into such sections as may be necessary in order to equitably distribute such cost of the management, operation, maintenance, re-

pair and renewal of, and all taxes, liens, water rents and assessments on, said several sections among the parties of the second part in proportion to their respective wheelage uses of such sections; * * *'

"It is further provided:

"'* * * and it may, from time to time, change such sectional divisions the better to subserve the purpose and intent aforesaid.'

"The lessor has divided said railroad, buildings and facilities, the common use of which is reserved to the parties hereto, into sections, and it has assigned to those sections the cost of the operation and maintenance thereof. That is to say, the materials and labor which have gone into, or which have been applied to a given section, have been charged to that section.

"The question before the Court has to do with the division of the management costs.

"Since 1902, and without objection by any one until 1929, the lessor has divided management costs on a wheelage basis as between sections, and having determined the management costs attributable to each section, has then divided the management, operation, and maintenance costs of each section on a wheelage basis.

"As has been indicated, this was done from 1902 down to 1929, without objection by any one.

"At that time, the Chicago & Erie Railroad Company objected, but it continued to pay management, operation, and maintenance costs which are charged to it by the lessor until 1933, when it ceased to pay any sums greater than those which would have been charged to it had the management costs been divided as between sections, on a basis which the Chicago & Erie Railroad Company says is more equitable and more in keeping, as it says, with Section 33 of the Joint Supplemental Lease of July 1, 1902.

"The Chicago & Erie Railroad Company says that management costs should be divided between sections on the basis of the ratio of the total of operation and maintenance cost of a given section to total operation and maintenance cost of the entire common property, and that the management cost for a given section having been determined and added to the opera-

tion and maintenance costs for that section, then the total of the three should be divided amongst the users of that section on a wheelage basis.

"What would be the ideal way to divide management costs between the users of different parts of a common property, the Court does not know.

"What would be the most equitable way to divide management costs between the users of different parts of the common property, the Court does not know.

"That the method of dividing management costs between the different portions of the common property suggested by the Chicago & Erie Railroad Company would be more equitable than the method which the lessor used without objection from 1902 to 1929, the Court does not believe.

"On the contrary, the Court is very strongly inclined to the opinion that the method of dividing management costs suggested by the Chicago & Erie Railroad Company would lead to a much more inequitable result than does the method which was followed for such a long period of years without objection.

"That Joint Supplemental Lease of July 1, 1902, does indicate that the parties had wheelage in mind as being an equitable way of dividing cost of management, operation, and maintenance. Certainly, nothing is said in there about a ratio of the sectional operation and maintenance expense, and total operation and maintenance expense. Nothing is said about that in the Joint Supplemental Lease of July 1, 1902. Something is said in that lease about wheelage.

"As the Court understands the facts, the parties were, in 1902, dividing management expense as between the sections on a wheelage basis. They were assigning to each section the actual cost of operation and maintenance of each section and, having gotten the cost of management, operation, and maintenance for a given section, they were dividing that cost of the three as amongst the parties on a wheelage basis.

"The fact that they were doing that, and that they continued to do it for such a long period of years is very persuasive to the Court that the parties thought that what they were doing, and what they continued to do, was fair and equitable, and was a fair interpretation of the meaning of the contract.

"There were additional Joint Supplemental Leases of 1917, 1925, 1932, and 1936. Each one of them contained provisions like unto the provisions of the Lease of July 1, 1902.

"It is the Court's conclusion that management expense is properly determined when it is divided as amongst the sections on a wheelage basis.

"The second general issue which was considered by counsel was the so-called rental issue. This issue relates to monies paid on account of nine parcels of property which are used as a part of the common property. As to eight of these parcels, the land is owned in fee by the Chicago & Western Indiana Railroad Company. The land was leased by the Chicago & Western Indiana to some one of the tenant owners, and then at a later date, the land was leased back to the Chicago & Western Indiana to be used as a part of the common property, for periods in each case equivalent to the unexpired portion of the term of the original lease.

"What I have said is true of eight of the leases. The ninth lease is a lease from the Santa Fe Railroad Company of property which is used as a part of the common property for which an annual payment is made.

"The Court is of the opinion that these rentals should be charged to the five owners, on the basis of one-fifth to each. It arrives at that conclusion from a consideration of the Preliminary Proprietary Agreement of January 16, 1902. That agreement provided that costs of the elevation, depression, and enlargements and improvements of, and addition to the lands and property of the Western Indiana Company, the common use of which has been, or may be reserved to the five tenant owners, should be paid by means of the issuance of bonds, the principal and interest of which bonds should be paid by the five tenant owners.

"The Court is of the opinion that these various contracts providing for the payment of money—eight of them to the five tenant owners, and one to the Santa Fe Railroad Company—provide for enlargements of, and additions to the lands and property of the Western Indiana Company, the common use of which has been, or may be reserved, and that, ac-

cordingly, the parties contemplated bonds should be issued therefor.

"The Court is of the opinion that the mere fact that bonds have not been issued does not relieve the owners, the five owners, of the obligation to pay in money the costs of those additions to, and enlargements of the common property.

"The Court is of the opinion that these monies which are paid out by the Western Indiana may be recovered from the owners and lessees, one-fifth from each.

"This Preliminary Proprietary Agreement of January 16, 1902, provided that bonds should be issued for the payment of the cost of acquiring or extinguishing the exceptional rights, privileges or exemptions which either parties of the second part possess or enjoy, in respect to any part of the common property of the Western Indiana Company.

"The 1902 Joint Supplemental Lease provided that the Western Indiana should pay to the Grand Trunk Company, as compensation for its release of the pecuniary benefits under said agreement of November 1, 1891, $20,665.35 per annum from the date hereof until it shall use for its traffic the railroad of the lessor, Western Indiana, south of 49th Street.

"Bonds were not issued for that purpose, however. The Court holds the same view in respect of this item as it holds in respect of the monies paid under the leases aforesaid. The mere fact that bonds were not issued does not destroy the right of the Western Indiana to recover from the five tenant owners this item which is required to be paid to the Grand Trunk, and in the Court's opinion, the Western Indiana may recover that sum, approximately $20,000.00 per annum, from the five tenant owners, one-fifth from each.

"If the Grand Trunk payment issue is regarded as a separate issue, then the next and fourth principal issue is that relating to the separate railroad operation. This refers to the expense of operating the suburban passenger trains by the Western Indiana, and the expense of freight switching operations by the Western Indiana.

"The Western Indiana, since August 1, 1904, has absorbed the loss on its separate suburban business, and since August 1, 1913, it has absorbed the expenses on its switching operations.

"The Monon and the Grand Trunk contend that the entire expense of operating both these services should be billed to the five lessees on a wheelage basis, though the gross receipts are retained in the treasury of the Chicago & Western Indiana.

"The Erie contends that the net loss should be billed to, and paid by the C. & E. I.

"The Court is of the opinion that this Preliminary Proprietary Agreement of January 16, 1902, and the Joint Supplemental Lease of July 1, 1902, set up a rather comprehensive scheme which was by the parties intended to supersede the numerous contracts, leases, and one thing and another that had been entered into between the parties in earlier years.

"The Court is of the opinion that those two contracts of 1902 do supersede the earlier contracts in respect of all the matters in controversy in this case. I think the last statement was too broad. Those two contracts do not supersede as to all of the items, but they do supersede as to additions to, and enlargements of the common property referred to in Section 33 of the Joint Supplemental Lease of July 1, 1902, and they do supersede earlier agreements as to the management, operation and maintenance of every portion of the common property referred to in Section 33 of the Joint Supplemental Lease of July 1, 1902.

"Those two contracts evidently contemplated that there would be some activities of the Western Indiana which would not be covered either by that Preliminary Proprietary Agreement, or the Joint Supplemental Lease of 1902.

"The expenses of operating the suburban passenger trains and of the freight switching service, or such items, the losses, if any, on these items should be absorbed by the Western Indiana.

"Next is the issue which has been referred to as the issue relating to miscellaneous charges and expenses. These miscellaneous charges and expenses have been paid by the Chicago & Western Indiana, and with one exception, have been billed to no one for reimbursement. The Chicago & Western Indiana has not received reimbursement. Those items relate to foreign freight cars, per diem, reclaims and repairs, expenses incident to rental on leased premises, certain rooms in the Dearborn Station leased to the Belt Railway Com-

pany, the Grand Trunk, The Wabash, and Eastern Illinois, for their respective exclusive occupancies, Illinois Franchise Tax, Federal Income Tax, work equipment, insurance, depreciation and repairs, expense on funded debt, track elevation, adjustments, retired bonds, and equipment.

"All of these items which the Court has enumerated are, in the Court's opinion, properly absorbed by the lessor. The one exception, which was referred to, is the taxes on surplus property, which are billed to the five owners, one-fifth to each.

"The Court has had a little difficulty in putting that item in a different class from the other items just referred to, and is not inclined to put it in any different class from the items just referred to, unless somebody can, within the next two days, show the Court why it should be, by a memorandum to be filed.

"I think the principal issues, most of them, have been covered by what the Court has said.

"Perhaps it might be well at this time to emphasize somewhat the Court's idea that the two contracts of 1902, so far as they are inconsistent with the earlier contracts between the parties—and they are inconsistent, in the Court's opinion, in some particulars—overrule those earlier contracts.

"Counsel may, within ten days, present drafts of findings of fact and conclusions of law, and a decree, not inconsistent with what the Court has stated.

"Counsel whose clients have any quarrel with the drafts which may be submitted in connection with this discussion may, within fifteen days from this date, file in writing their objections to, or observations in respect of such drafts. Counsel who submit the drafts may, within twenty days from this date, submit such, if any, reply as may seem necessary or desirable. That having been done, the making of findings of fact, and conclusions of law, and the decree will be taken without further oral argument.

PERTINENT FINDINGS OF FACT OF DISTRICT COURT:

"(32) Paragraph Ninth of the Preliminary Proprietary Agreement of January 16, 1902, and paragraph 33 of the Joint Supplemental Lease of July 1, 1902 (the provisions of which are repeated in the five joint supplemental leases above referred to) relate to and cover the same subject matter and are inconsistent with the provisions of paragraphs 5th and 6th of the Inter-Tenant Agreement of November 1, 1882, and the provisions in prior leases and agreements relating to and defining the expenses of the Western Indiana to be paid by the five lessee roads on a wheelage basis.

"(33) The six parties to the Preliminary Proprietary Agreement of January 16, 1902, and to the Joint Supplemental Lease of July 1, 1902, in executing said agreement and lease, provided a new definition of the expenses of the Western Indiana for which it was to be reimbursed directly by the five tenant owners, and a new basis of apportioning the said obligation to reimburse the Western Indiana, among the five roads who were parties of the second part in said agreement, and lessees in said Joint Supplemental Lease, such definition and basis to become effective from and after the execution of the Joint Supplemental Lease of July 1, 1902."

* * * * *

"(35) The said six parties to the Preliminary Proprietary Agreement of January 16, 1902, and the Joint Supplemental Lease of July 1, 1902, intended that the new definition and basis therein provided for, as hereinabove stated, should supersede and abrogate the various provisions of prior contracts, leases and agreements between the parties as to the definition of expenses of the Western Indiana for which it was to be reimbursed directly by the five tenant owners, and as to the basis of apportioning said reimbursement obligations among said five tenant owners." (Rec. 410-411.)

PERTINENT CONCLUSIONS OF LAW OF THE DISTRICT COURT:

"(1) The Preliminary Proprietary Agreement of January 16, 1902, and the Joint Supplemental Lease of July 1, 1902, provided a new definition of the expenses of the Western Indiana for which it was to be reimbursed directly by the five tenant owners, and a new basis of apportioning said obligation to reimburse the Western Indiana among the five tenant owners, which definition and basis became effective from and after the execution of the Joint Supplemental Lease of July 1, 1902.

"(2) In and by the Preliminary Proprietary Agreement of January 16, 1902, and the Joint Supplemental Lease of July 1, 1902, the six parties to said agreement and lease agreed that from and after the date of said Joint Supplemental Lease each of the five tenant owners should have equal right to use the common property of the Western Indiana upon like terms and conditions, and that each of said five tenant owners should pay an equal part of the cost of said common property, and of all enlargements and improvements thereof, and additions thereto.

"(3) The provisions of paragraph Ninth of the Preliminary Proprietary Agreement of January 16, 1902, and of paragraph 33 of the Joint Supplemental Lease of July 1, 1902, superseded and abrogated the provisions of paragraphs 5th and 6th of the Inter-Tenant Agreement of November 1, 1882, and the various provisions in prior leases, contracts and agreements, defining the expenses of the Western Indiana to be paid by the five tenant owners and providing the basis of apportioning said obligation among said five tenant owners.

"(4) Paragraph 33 of the Joint Supplemental Lease of July 1, 1902, is and has been, since July 1, 1902, the only agreement of the parties to said lease defining and controlling the expenses of the Western Indiana for which it is to be reimbursed directly by the five tenant owners." (Rec. 435-436.)

(13)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 911-913

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, A CORPORATION, AND WABASH RAILROAD COMPANY, A CORPORATION,

Petitioners,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, A CORPORATION; HOLMAN D. PETTIBONE AND L. F. DERAMUS, TRUSTEES OF CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY; CHICAGO AND WESTERN INDIANA RAILROAD COMPANY, A CORPORATION; AND CHICAGO AND ERIE RAILROAD COMPANY, A CORPORATION,

Respondents.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE BLAKEMORE-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

SUBJECT MATTER INDEX.

Alphabetical Table of Cases Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, A CORPORATION, AND WABASH RAILROAD COMPANY, A CORPORATION,

Petitioners,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, A CORPORATION; HOLMAN D. PETTIBONE AND L. F. DERAMUS, TRUSTEES OF CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY; CHICAGO AND WESTERN INDIANA RAILROAD COMPANY, A CORPORATION; AND CHICAGO AND ERIE RAILROAD COMPANY, A CORPORATION,

Respondents.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAY IT PLEASE THE COURT:

Chicago & Eastern Illinois Railroad Company and Wabash Railroad Company, petitioners, herewith submit their brief and argument in support of their petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Opinions of the Courts Below.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, rendered June 2, 1941 and filed June 17, 1941 (R. 382; Appendix, 22) is not reported.

The March 17, 1943 opinion of the United States Circuit Court of Appeals for the Seventh Circuit in appeals Nos. 7875, 7876 and 7877 (R. 710; Appendix, 1) is reported in 140 F. 2d 120.

The March 19, 1943 opinion of said Circuit Court of Appeals in appeal No. 7878 (Appendix, 12) is reported in 140 F. 2d 126.

The January 21, 1944 opinion of said Circuit Court of Appeals in appeals Nos. 7875, 7876, 7877 and 7878 (R. 944; Appendix, 18) is reported in 140 F. 2d 130.

Jurisdiction.

The grounds for the jurisdiction of this Court are set forth in the petition (p. 17).

STATEMENT OF THE CASE.

The facts are sufficiently set forth in the petition (pp. 3-16). For convenience, the same short terms used in the petition to designate the Courts, the parties, other lessees, the instruments and certain phrases therein will be used in this brief.

SPECIFICATION OF ERRORS.

If the writ is granted, petitioners will urge that the Circuit Court erred in the following respects:

(1) In reversing the decree of the District Court.

(2) In not holding that since 1902 the definition of wheelage expenses in paragraph 33 of the 1902 Lease has been and presently is the controlling definition of such expenses.

(3) In not holding that since 1902 the method of apportioning wheelage expenses provided in paragraph 33 of the 1902 Lease has been and presently is the controlling method.

(4) In holding that paragraph Ninth of the 1902 Agreement and paragraph 33 of the 1902 Lease did not supersede and abrogate paragraph 6th of the 1882 Agreement.

(5) In holding that paragraph Ninth of the 1902 Agreement and paragraph 33 of the 1902 Lease did not supersede and abrogate paragraph 5th of the 1882 Agreement.

(6) In holding that the 1902 Agreement was merged in the 1902 Lease.

(7) In not giving any force or effect to the 1902 Agreement.

(8) In not applying the Illinois rule of law which requires that the provisions in a later agreement, covering the same subject matter but inconsistent with the provisions of an earlier agreement, supersede and abrogate such earlier provisions.

(9) In holding that paragraph 37 of the 1902 Lease related to or in any manner affected the 1882 Agreement.

(10) In holding that paragraph 37 of the 1902 Lease related to or in any manner affected paragraphs 5th and 6th of the 1882 Agreement.

(11) In holding that paragraph 33 of the 1902 Lease did not come within the exception clause of paragraph 37 of said lease.

(12) In holding that paragraph 33 of the 1902 Lease did not affect the "all inclusive clause" in paragraph 6th of the 1882 Agreement.

(13) In holding that the five tenant owners are liable on a wheelage basis for any of the expenses involved in this proceeding.

(14) In holding that the five tenant owners are liable on a wheelage basis for any of the expenses involved in this proceeding because of the provisions of paragraph 6th of the 1882 Agreement.

(15) In holding that the five tenant owners are liable on a wheelage basis for any of the expenses involved in this proceeding because of the "all inclusive clause" in paragraph 6th of the 1882 Agreement.

(16) In not holding that any of the expenses involved in this proceeding come within that language in paragraph 6th of the 1882 Agreement which excludes certain expense items therein designated from the definition of wheelage expenses in said paragraph.

(17) In failing to hold that the expenses involved in

this proceeding are not within the definition of wheelage expenses in paragraph 33 of the 1902 Lease.

(18) In failing to decide the question which the Circuit Court designated as being the only question in the case.

(19) In failing to decide the five important questions stated at page 19 of the petition.

(20) In failing to give effect to the many stipulated facts, including, among others, those bearing on the intention of the parties as evidenced by their conduct for a period of over thirty years.

(21) In denying the petition for leave to present newly discovered evidence.

(22) In denying the petition for rehearing.

SUMMARY OF ARGUMENT.

Point I.

The Circuit Court reversed the judgment of the District Court upon a theory original with the Court and patently erroneous. In so doing, it has so far departed from the accepted and usual course of judicial proceedings as to require an exercise of this Court's power of supervision. (*Infra*, p. 8.)

Point II.

Although the Circuit Court propounded for its ultimate determination a single question, it entirely ignored and failed to decide such question. In so doing, the Circuit Court has again so far departed from the accepted and usual course of judicial proceedings as to require an exercise of this Court's power of supervision. (*Infra*, p. 17.)

Point III.

The Circuit Court has rendered conflicting decisions on separate appeals, and conflicting decisions on the same appeals as well, from the same decree, on the same stipulated facts and involving the same instruments. This is an even more serious conflict than one between decisions of Circuit Courts of Appeal of different circuits, and is a further departure from the accepted and usual course of judicial proceedings warranting the exercise by this Court of its power of supervision. (*Infra*, p. 18.)

Point IV.

Although a declaratory judgment was sought, the Circuit Court left undecided several questions which, although argued, are important only because of the erroneous decision of that Court. If upon review this Court reverses such decision, all of these questions will disappear; otherwise, further litigation is inevitable. (*Infra,* p. 24.)

Point V.

The importance of the case is such as to warrant the exercise by this Court of its power of supervision. (***Infra,*** p. 28.)

ARGUMENT.

Point I.

The Circuit Court Reversed the Judgment of the District Court Upon a Theory Original With the Court and Patently Erroneous. In So Doing, It Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Require an Exercise of This Court's Power of Supervision.

In its March 17, 1943 opinion the Circuit Court states that the seriously argued question, on which petitioners had to rely in order to prevail, is "the cancellation (or abrogation) of the 1882 agreement by the 1902 agreement" and that the District Court, appreciating its importance, had met the question squarely and held that paragraph Ninth of the 1902 Agreement and paragraph 33 of the 1902 Lease had superseded and abrogated paragraphs 5th and 6th of the 1882 Agreement and the various provisions in prior leases concerning wheelage expenses (R. 718; Appendix, 8-9). The Court thus recognized that the fundamental and controlling question presented for decision is: Which is the controlling lease or contract provision which has, since 1902, defined the expenses of Western Indiana to be paid by the five tenant owners on a wheelage basis and provided the method of apportionment thereof?

In said opinion the Court decided that the definition of such expenses is controlled by the "all inclusive clause" appearing in paragraph 6th of the 1882 Agreement, and that the five tenant owners are therefore liable for all of the expense items involved on a wheelage basis (R. 720-721; Appendix, 10-11).

The theory upon which the Court reached this decision

was that the reference in paragraph 37 of the 1902 Lease to "said existing leases" referred to and included the 1882 Agreement; that paragraphs 5th and 6th of said 1882 Agreement were thereby preserved, except insofar as they were specifically changed by the 1902 Lease; and that the "all inclusive clause" in paragraph 6th was not affected by paragraph 33 of said 1902 Lease (R. 718-721; Appendix, 9-11).

This theory is both original with the Court and patently erroneous.

(1) The Theory Is Original With the Court.

The foregoing theory was neither raised nor urged in the Circuit Court by any of the respondents herein; it was not advanced in the Statement of Points on Appeal (R. 454-462, 467-475, 479-481, 486-494) or in any pleading filed by any such respondent in the District Court; neither does it appear anywhere in the findings of fact (R. 401-435), conclusions of law (R. 435-440), opinion (R. 382-389) or decree (R. 442-447) of the District Court.

The brief filed by Grand Trunk and Monon in the Circuit Court* clearly reveals that their position was exactly the opposite of the theory originated by that Court. These respondents there stated (pp. 55-56):

> "Moreover, the references in the Joint Supplemental Lease of 1902 to prior contracts between the parties were, with one exception, limited to prior *leases* (T. 530); the 1882 Intertenant Agreement was *nowhere mentioned.* In fact, the only mention made of *any* prior *agreement* (as distinguished from 'lease') was the Agreement of November 1, 1891. This agreement, however, had nothing whatever to do with the 'working expenses' payable to Western Indiana, with which paragraphs 5th and 6th of the 1882 Intertenant Agreement dealt; * * *"

* The briefs of respondents herein, filed in the Circuit Court, have been certified to this Court.

The only reference to paragraph 37 of the 1902 Lease in their forty pages of argument appears at the bottom of page 58, where they state:

> "Not only were the changes intended to be made thus clearly described, specified and enumerated, but paragraph 37 provided (T. 236; Ex. 2; T. 545):" (followed by a quotation of paragraph 37).

This reference, however, was the concluding sentence to an argument to the effect that the changes intended to be made by the 1902 Lease were carefully and exactly stated in that document, and, with one exception—viz., the agreement of November 1, 1891—were limited to the provisions of prior leases. This argument consists of an enumeration of the provisions deemed cancelled or modified by said respondents, the statement that with the one exception noted above such changes were limited to the provisions of prior leases, and the statement that the exact changes intended to be made by the 1902 Lease were carefully and exactly stated and were designed to give each of the five tenant owners equal right of use of the common property upon the payment of equal rental therefor. It is then that the above quoted reference is made. It is clear that that reference was made as a final support to such argument (with which we disagree), which is entirely different from the theory developed by the Court.

Erie's briefs filed in the Circuit Court disclose that, rather than advancing the theory formulated by the Court, its contention was also of an entirely different nature.

Erie never disagreed with the contention of petitioners and the holding of the District Court that the 1902 Lease is the controlling document. At page 85 of its main brief, after having referred to paragraph 33 of the 1902 Lease, Erie states:

> "And to show that the rule so provided for was a new rule, the parties provided that it shall go into effect 'from and after the date hereof'."

However, in its argument on the "disputed rentals" issue Erie evidently recognized that the definition of wheelage expenses in paragraph 33 did not include those expenditures, and it sought by a devious argument to carry forward and read into paragraph 33 the broad comprehensive terms used in paragraph 6th of the old 1882 Agreement.

The pertinent portions of this argument, which appears at page 91 of the Erie brief, are:

> "The incorporation of covenants of prior leases into the 1902 joint supplemental lease by reference, except as specifically otherwise provided, shows the parties intended to retain the all inclusive character of operating cost.
>
> • • • • •
>
> "* * * When the parties defined 'working expenses' so comprehensively in the 1882 intertenant agreement, it is only natural and consistent to give 'joint expenses' in the concurrent supplemental leases the same comprehensive meaning. When the covenants of the 1882 supplemental leases were incorporated in the 1902 joint supplemental lease by reference, it is natural and consistent to assume that 'operating expenses' and 'the entire cost' of management, operation and maintenance of plaintiff's railroad, buildings and facilities, have as comprehensive and all inclusive a meaning as 'joint expenses' and 'working expenses' had in the earlier agreements."

Paragraph 35 of the 1902 Lease contains provisions incorporating into that lease the provisions of prior *leases* except as "otherwise expressly provided herein." (R. 235, 544.) It is this provision upon which Erie's foregoing argument of necessity was predicated. Nowhere in its briefs, except in a statement of the facts, did Erie even mention paragraph 37 of the 1902 Lease, either directly or by inference.

Petitioners cite the foregoing argument only to show wherein Erie's position differed from the Court's theory

and do not admit that such argument is valid or correct. Petitioners recognize the impropriety of demonstrating in this brief the errors in the foregoing arguments of said respondents and, therefore, have refrained from so doing.

In its brief filed in the Circuit Court, Western Indiana made no argument as to any of the expense items involved in this petition.

Thus it is clear that the theory upon which the Circuit Court decided the fundamental and controlling question, hereinabove described, was originated by that Court itself.

This Court has granted certiorari where the decision of the Circuit Court has been based on a point neither presented nor argued by the litigants. *LeTulle* v. *Scofield*, 308 U. S. 415. In that case this Court, speaking through Mr. Justice Roberts, said (p. 416):

> "We took this case because the petition for certiorari alleged that the Circuit Court of Appeals had based its decision on a point not presented or argued by the litigants, which the petitioner had never had an opportunity to meet by the production of evidence."

Petitioners have never had any opportunity to argue against or to expose the obvious fallacy in the theory adopted by the Circuit Court before a tribunal so situated that it could receive and consider such arguments with an open mind. Nor was there any necessity for petitioners to do so because, as above stated, none of the litigants raised or urged said theory. It is true that petitioners sought to point out to the Circuit Court its error in their petition for rehearing (R. 732-736); the argument in that petition, however, was of necessity addressed to the Circuit Court only after it had already conceived as its own and had become committed to the fallacious theory upon which it decided the case. At that point petitioners were arguing with the Court rather than with other litigants in this case.

(2) The Court's Theory Is Patently Erroneous.

Paragraph 37 of the 1902 Lease (R. 236, 545) reads as follows:

> "37. No Changes Unless Specified.) Fifteenth. That nothing herein contained shall in any way alter, impair or affect *said existing leases*, or any or either of them, or any matter or thing therein, except as herein otherwise specifically provided." (Italics supplied.)

In developing its theory, the Court adopted as the major premise thereof the mistaken assumption that paragraph 37 referred to and included the 1882 Agreement. It also, throughout its March 17, 1943 opinion, used the words "lease" and "agreement" as though they were synonymous.

The startling proposition which constitutes the Court's major premise—viz., that the 1882 *Agreement* is within the reference in paragraph 37 to "said existing *leases*" —appears (R. 719; Appendix, 9):

> "In view of the express provision above quoted, to the effect that no impairment, no alteration, and no effect of existing *leases* occurred by virtue of this, the 1902 agreement (meaning lease)*, 'except as herein otherwise specifically provided', we must reject the contention that there was 'a cancellation' or 'an abrogation' of paragraphs 5 and 6 of the 1882 *agreement* by the July 1st, 1902 agreement." (Italics and parenthetical matter supplied.)

The Court then states that the extent to which existing *leases* were otherwise specifically superseded by paragraph 33 of the 1902 Lease must be determined, but it immediately refers instead to the provisions of paragraph 6th of the 1882 *Agreement* (R. 719; Appendix, 9-10).

* The Circuit Court in its opinion uniformly refers to the 1902 Lease as an agreement, except in its statement of the facts.

Subsequently, the Court states (R. 720; Appendix, 11):

> "Our conclusion is that paragraph 37 of the 1902 agreement is express and explicit in its terms. That paragraph makes it impossible for us to conclude that the agreement of 1902 abrogated the previous existing *agreements* or rights of the lessees. On the other hand, that paragraph expressly sustained all existing *contract* rights not specifically changed." (Italics supplied.)

Thus, the Court's mistaken assumption that the reference in paragraph 37 to "said existing *leases*" includes the 1882 *Agreement* pervades its whole opinion and is the cornerstone upon which its entire theory is built.

The fallacy in this major premise is readily apparent.

In the first place, the reference in paragraph 37 to "said existing leases" relates only to the leases previously enumerated in paragraph 3 of the same 1902 Lease, which is captioned "The Existing Leases". (R. 530-531.) The 1882 Agreement is not there listed.

In the second place, the 1882 Agreement is not a lease at all! No one has ever claimed that it is. It is a contract between the parties of a character entirely different from a lease (R. 196-202). Yet, the Circuit Court throughout its March 17, 1943 opinion has failed to differentiate between the *leases* involved and the *agreements* involved. On the contrary, it has treated and used these two terms interchangeably as though they were synonymous.

In the third place, under the well settled and applicable principle "*expressio unius est exclusio alterius,*" the use of the specific term "leases" in paragraph 37 excluded therefrom every then existing agreement which was not a lease.

Lastly, the fallacy in said major premise is further demonstrated by the resolution adopted unanimously by the authorized representatives of the five tenant owners at

their meeting held in July, 1900, which provided that *all existing contracts* between Western Indiana and the five tenant owners be cancelled and that a new agreement be executed by them (R. 780, 828), and further, by the fact that said resolution was carried out and the new agreement therein provided for was in fact formulated and executed, being the January 16, 1902 Agreement (R. 509-518). The aforesaid resolution was part of the newly discovered evidence, sought to be presented by petitioners, but excluded by the Circuit Court in its January 21, 1944 opinion for reasons wholly unrelated to the purposes for which such evidence was offered (R. 946-947; Appendix, 20).

Furthermore, the error in the Circuit Court's theory is not confined to the fallacy in the major premise therof. Its conclusions based upon such premise are equally erroneous.

In its March 17, 1943 opinion the Court states (R. 719; Appendix, 9-10) that "we must read and give effect to paragraph 33 to ascertain the extent that the existing leases were by it otherwise specifically superseded."

It then sets forth paragraph 6th of the 1882 Agreement and italicizes the "all inclusive clause." (R. 719; Appendix, 10.) The Court then says:

> "This italicized provision does not appear in paragraph 33 of the 1902 agreement. Specifically, the question is,—Should we, in view of paragraph 37 (1902 agreement) * * * hold that this provision of paragraph 6 was cancelled? * * * Paragraph 37 of the 1902 agreement expressly covers the situation. The quoted agreement appearing in paragraph 6 does not come within the exception of paragraph 37." (R. 719-720; Appendix, 10.)

But *effect* must be given to paragraph 33; mere lip service is not enough.

Paragraph 33 of the 1902 Lease on its face sets forth a new and limited definition of wheelage expenses and a new and different method of apportioning the same (R. 234-235, 543-544), which definition and method are entirely different from the former definition and method contained in paragraphs 6th and 5th, respectively, of the 1882 Agreement (R. 199-200). Clearly, these provisions come within the exception in paragraph 37 of the 1902 Lease (R. 236, 545). If they do not, then what was the purpose of the parties in including these specific provisions in paragraph 33? It is unthinkable that the parties should carefully incorporate provisions in a lease and then nullify them, wholly or in part, by a later provision in the same document. Furthermore, if such provisions do not come within said exception, what was the purpose of the parties in subsequently executing five later joint leases containing almost identical provisions?

Nor may these provisions of the 1902 Lease be rejected as surplusage. *W. & S. Indemnity Co.* v. *Industrial Commission*, 366 Ill. 240, 243; *Miller* v. *Robertson*, 266 U. S. 243, 251. The respondent Erie has not only recognized but insisted upon this point, for in its brief filed with the Circuit Court it said (p. 45):

> "Every word and clause of paragraph 33 of the 1902 joint supplemental lease should be given effect and no part thereof should be rejected for lack of meaning or surplusage."

Yet, the effect of the Court's further errors in pursuing its theory is that it has superimposed the general "all inclusive clause" in paragraph 6th of the 1882 Agreement upon the specific and limited provisions of paragraph 33 of the 1902 Lease, thereby "blacking out" and rendering superfluous said later provisions.

The only reason given by the Court to support this result—viz., that the "all inclusive clause" does *not* appear

in paragraph 33 (R. 719-720; Appendix, 10)—is obviously inadequate for, if it *did* appear therein, it would be a part of the later definition. Its absence therefrom conclusively shows that it was intentionally omitted from the definition in paragraph 33.

We respectfully submit that, in deciding the entire case on a theory both original with the Court and patently erroneous, the Circuit Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision to correct a flagrant error and to prevent a gross miscarriage of justice.

Point II.

Although the Circuit Court Propounded for Its Ultimate Determination a Single Question, It Entirely Ignored and Failed to Decide Such Question. In So Doing, the Circuit Court Has Again So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Require an Exercise of This Court's Power of Supervision.

After erroneously assuming that paragraph 37 of the 1902 Lease was controlling, the Circuit Court then stated in its March 17, 1943 opinion (R. 719; Appendix, 9):

> "Consequently there is presented only the effect of the 1902 agreement on existing leases."

(As shown in Point I of this argument, in referring to the 1902 agreement the Court meant the 1902 Lease.)

Nowhere in the opinion is this single question posed by the Court decided or, for that matter, even discussed or again referred to. In fact, no provision of any of "said existing leases" is anywhere set forth or discussed in the opinion except in the Court's statement of the facts.

Instead of answering the question so posed by it, the

Court pursued its own original theory to its eventual decision. The errors in this theory have been fuily set forth in Point I of this argument.

Even upon the Circuit Court's own theory that paragraph 37 is controlling, this failure to answer the question stated by the Court is of vital importance since neither the "all inclusive clause" in the 1882 Agreement, under which the Court held the tenant owners liable on a wheelage basis for all of the expenses involved (except the Grand Trunk payment), nor any similar clause is contained in any of "said existing leases" (R. 185-195, 202-208, 217-219).

In view of the complete abandonment by the Circuit Court of this question singled out by it as the "only" question, we respectfully urge that such action constitutes a departure from the accepted and usual course of judicial proceedings requiring the exercise of this Court's power of supervision.

Point III.

The Circuit Court Has Rendered Conflicting Decisions on Separate Appeals, and Conflicting Decisions on the Same Appeals as Well, From the Same Decree, on the Same Stipulated Facts and Involving the Same Instruments. This Is An Even More Serious Conflict Than One Between Decisions of Circuit Courts of Appeal of Different Circuits, and Is a Further Departure From the Accepted and Usual Course of Judicial Proceedings Warranting the Exercise by This Court of Its Power of Supervision.

The Circuit Court's decision as to which expenses of Western Indiana the five tenant owners are liable for on a wheelage basis was rendered in the three appeals herein sought to be reviewed on the theory that paragraphs 5th and 6th of the 1882 Agreement are the controlling provisions.

In its March 17, 1943 opinion the Court said (R. 719; Appendix, 9):

> "* * * we must reject the contention that there was 'a cancellation' or 'an abrogation' of paragraphs 5 and 6 of the 1882 agreement by the July 1st, 1902 agreement." (meaning lease),

and further, with specific reference to the "all inclusive clause" in paragraph 6th of the 1882 Agreement (R. 720; Appendix, 10):

> "The quoted agreement appearing in paragraph 6 does not come within the exception of paragraph 37. It therefore clearly follows that the lessees are all bound by the above-quoted provision of section six (meaning paragraph 6) and must pay the expenses, such as rent and other items which are the subject of this litigation, on a wheelage basis." (Parenthetical matter supplied.)

In its March 19, 1943 opinion on the Erie appeal (C.C.A. No. 7878) the Court's decision was rendered on the theory that paragraph 33 of the 1902 Lease is the controlling provision. In its opinion in that appeal the Court said (Appendix, 13):

> "More specifically it may be said that Erie predicates its argument on the July 1st, 1902 agreement (meaning lease), which is one agreement where the 1882 inter-tenant agreement is specifically changed." (Parenthetical matter supplied.)

The conflict between the foregoing decisions is readily apparent when it is realized that the Court's fundamental misconception of the scope of paragraph 37 of the 1902 Lease is the foundation and sole support upon which its entire decision in the three appeals rests.

The opinion of the Circuit Court has unfortunately resulted in a cloak of concealment being thrown over the real issues in the case. When, however, the Court's erroneous and fundamental misconception as to paragraph

37 is removed, the real inquiry in the case assumes its true and paramount importance. This inquiry concerns the effect, under the applicable rule of law, of paragraph Ninth of the 1902 Agreement and paragraph 33 of the 1902 Lease upon paragraphs 5th and 6th of the old 1882 Agreement.

The applicable rule of law requires that in a case involving facts like those in the case at bar, the 1902 provisions supersede and abrogate the 1882 provisions *in their entirety*, and that, accordingly, the two separate decisions of the Circuit Court should be identical on this point.

The Court's decisions, however, are not so identical. On the contrary, they are directly opposed!

The result required by the applicable rule of law has been accomplished under the decision in the Erie appeal. That result has not been accomplished under the decision in the three appeals involved in this petition; it has been defeated. Thus, the two decisions are in irreconcilable conflict.

Under the rule of law which petitioners consistently have contended is applicable, the provisions of the 1902 Agreement (as effectuated and carried out by the 1902 Lease) superseded and abrogated all provisions in earlier agreements and leases insofar as the 1902 provisions cover the same subject matter and are inconsistent with the provisions in the earlier instruments.

This rule has been established as the law in the State of Illinois by repeated decisions of the courts of that state, among which are the following:

Stow v. *Russell, et al.*, 36 Ill. 18, 30;

Harrison, et al. v. *Polar Star Lodge*, 116 Ill. 279, 287;

Lloyd, et al. v. *Campbell*, 186 Ill. App. 566, 570-571.

The latest statement of the foregoing rule appears in the last of the three cases above cited, where the Court said, at pages 570-571:

> "Appellant asserts the doctrine that when a new contract is inconsistent with an earlier one, so that they cannot subsist together, the latter takes the place of the former; that when the new contract is in regard to the same matter and has the same scope as the earlier contract and the terms of the two contracts are inconsistent, so that they cannot subsist together, the new contract as a general rule abrogates the earlier one and takes the place of so much thereof as is affected by the new contract. This position is undoubtedly correct. 3 Elliott on Contracts, sec. 1865; *Harrison* v. *Polar Star Lodge,* 116 Ill. 279. So also is appellant's further contention, that when a new contract upon the same subject-matter is entered into by the parties, this works a rescission or abandonment of the previous contract."

The rule was applied by the Supreme Court of Illinois in a case between two of the present litigants involving certain of the same leases and contracts which are the subject matter of the instant litigation (*Chicago & W. I. R. R. Co.* v. *Chicago & E. I. R. R. Co.,* 260 Ill. 246); and the rule was both stated and applied in 1905 in a similar litigation between all five tenant owners by the same Circuit Court that decided this case (*Grand Trunk W. Ry. Co.* v. *Chicago & E. I. R. Co.,* 141 Fed. 785).

The District Court found as facts that paragraph Ninth of the 1902 Agreement and paragraph 33 of the 1902 Lease relate to and cover the same subject matter and are inconsistent with the provisions of paragraphs 5th and 6th of the 1882 Agreement and the provisions in prior leases and agreements relating to and defining the expenses of Western Indiana to be paid by the five tenant owners on a wheelage basis (R. 410-411; Appendix, 29). The District Court followed the Illinois law and concluded that the

provisions of paragraph Ninth of the 1902 Agreement and of paragraph 33 of the 1902 Lease did supersede and abrogate the provisions of paragraphs 5th and 6th of the 1882 Agreement, and the various provisions in prior leases, contracts and agreements defining the Western Indiana expenses to be paid by the five tenant owners and providing the basis for apportionment thereof (R. 436; Appendix, 30).

The Circuit Court did not set aside the aforementioned findings of fact; but, due to its untenable theory, the error of which we have fully explained in Point I of this argument, the Court differed with the conclusion of law based upon such findings. Stripped of such erroneous theory upon which its entire decision is grounded, the decision of the Circuit Court in these three appeals is not only in conflict with its separate decision in the Erie appeal, but it is also completely at variance with the aforesaid rule of law and the applicable Illinois decisions.

In addition to the foregoing conflict between the decisions on the separate appeals, there is also a conflict within the decision, as finally rendered by the Court, on the three appeals here in question. In its initial decision of March 17, 1943 the Court held that all of the expense items involved in these three appeals, including the Grand Trunk payment, are payable by the five tenant owners on a wheelage basis by virtue of the provisions of paragraph 6th of the 1882 Agreement. In its subsequent and final decision of January 21, 1944 the Court reversed its holding as to the Grand Trunk payment, and held that such item is payable by the five tenant owners on an equal basis.

The reason which impelled the Court to reverse its position is indeed obscure and cannot be discovered in the language employed by the Court. In its January 21, 1944 opinion the Court said (R. 947; Appendix, 20-21):

"While the argument which led to the conclusion in our opinion, here under review, to the effect that this item, like the others, should be paid for on a wheelage basis, has support, there are, in the applicable written contracts and leases, provisions as to this item which control, and they require this item of cost of operation to be paid by the lessees on an equal basis.

"* * * However, there was an acknowledged, written exception to this method (wheelage) of distributing lessor's costs and expenses. The close and narrow question which was presented, and upon which we reached a conclusion which we now believe was erroneous, was this—Did the item of $20,665.35 payable to Grand Trunk fall within the provision for working expenses, or was it a capital cost item to be met by the lessees on an equal basis?" (Parenthetical matter supplied.)

It will be observed that the Court's language is most general. It does not state which are the "applicable written contracts and leases," nor does it point out which are the "provisions as to this item which control."

In this same decision the Court rejected the newly discovered evidence offered by petitioners, which is the only evidence that was ever available showing that this item was to be paid on an equal basis. There is no provision in the 1882 Agreement excluding this item from the "all inclusive clause," and the Court has not pointed out any such provision. The only other lease or agreement relating to the definition of wheelage expenses and the method of apportioning the payment thereof to which the Court gives any consideration in any of its opinions is the 1902 Lease.

Since the Court rejected the newly discovered evidence, and since there is no provision in the 1882 Agreement excluding the Grand Trunk payment from the "all inclusive clause," and since the only other contract or lease covering these questions which the Court considers

ate the terminal (R. 208-214); and (c) that title to the structures and facilities became vested in the City immediately upon the annexation to the City's land. Some of these as well as other grounds mentioned are answered elsewhere herein or are not of sufficient importance to require an answer (City's Brief, p. 14).

In Paragraph 1 of the agreement of November 16, 1935 (R. 482) the City granted to respondent for the purposes of a freight terminal for market purposes, the right and privilege to construct, erect, maintain and operate a float bridge, etc. in Wallabout Market in the Borough of Brooklyn, City of New York in accordance with the map or plan attached. Paragraph (6) required the respondent at its own expense to construct the float bridge, float bridge protector rack, etc. substantially as shown on the map attached, with the necessary railroad structures, appurtenances and equipment, and maintain the same at all times in good working order and condition. Paragraphs 7 through 20, inclusive, relate solely to construction work, improvements and maintenance to be installed and performed by respondent. The agreement contains no provision giving the Department of Markets or any other municipal department supervision and control of the operation of this freight terminal.

Paragraph 16 requires respondent to transfer by car floats or other means to the Wallabout Market freight station from the terminals of nine railroads, specifically referred to, cars containing freight consigned to Wallabout Market station subject to tariffs and regulations of the several railroads, and place said cars upon the team tracks for unloading by the consignees.

There is no provision in the agreement for the rendition of services by respondent to the City or on behalf of the City, nor did the City covenant to pay respondent for any services or contribute to the cost of construction, main-

tenance and operation of the freight terminal facilities in Wallabout Market except as provided in Paragraph (26) of the agreement (R. 506-507), in the event that the City elected to terminate the agreement after the lapse of ten years in which case it was required to compensate respondent in an amount equivalent to the unamortized cost of construction of the terminal as defined therein.

Respondent is entitled to all the revenues arising from the transportation of loaded cars from the nine trunk line railroads to Wallabout Market terminal and assumed all of the obligations incidental thereto. Its only obligation was to pay to the City the sum of One Dollar for each loaded car received at Wallabout Market other than cars consigned to the United States Navy Yard and market produce cars of less than 28,000 pounds in billed weight, together with a sum equal to all track storage charges accruing to the Terminal, pursuant to any track storage tariff rule or regulation from time to time in force (Deft.'s Ex. 8; R. 531).

Respondent had no authority as an alleged agent to bind the City as its principal in any obligation nor was the City in any way responsible for respondent's operations.

The claim that respondent merely had a privilege to use the City's land as its agent for the purpose of performing services required under the agreement—disregards respondent's right to continuous possession, occupation and use of the market ways and dock for a definite period of time for profit derived from its operations as a transportation company. The absence of any language of employment in this agreement refutes this contention.

The modification agreement of April 18, 1936 eliminated paragraph 24 of the original agreement (R. 55-6) which provided that the City impose a market charge of not less than $1 per car per day, etc. in addition to demurrage or track storage charges payable under tariffs of the rail-

roads, and charge respondent with the duty of collecting these charges and to account and remit the same to the City (Deft.'s Exs. 1, 6 and 8, R. pp. 43, 159, 177). The modification granted to respondent the right to collect the charges from the trunk line railroads using its own transportation facilities to the Wallabout Market Terminal and provided for a charge to be paid by respondent to the City of the sum of $1 per car for each loaded car received at Wallabout Market. This clearly shows that it was not the intention of the parties that respondent should act as agent for the City in any capacity or for any purpose.

POINT VIII

The principle of frustration of an executory contract is wholly inapplicable where valuable property rights constituting an estate or interest in real property are appropriated in a condemnation proceeding.

The City's claim that performance of the agreement of November 16, 1936 was frustrated by the acquisition of its Wallabout Market property by the United States of America on April 1, 1941 and not by an act of the City of New York, and therefore is not compensable in the condemnation proceeding, is illogical and unsupported by the facts of this case.

Frustration and appropriation are essentially different things. In this proceeding the fee title and all estates, improvements, leases and encumbrances thereon were appropriated by the United States, including all immovable fixtures, among which was the tangible property erected on the market ways and dock by respondent under the agreement. This taking included the right of possession, occupation and use by it of the market ways and dock for the operation of the terminal facilities for the period of ten years with right of renewal for an additional term of ten years.

Appellant is not seeking compensation for the loss of earnings to be derived under the agreement from the future operation of this freight terminal, the performance of which the Government's action has made impossible. It has lost its tangible property as well as the value of its rights, possession, occupation and use of this freight terminal, and just compensation includes not merely the value of its tangible property but also the fair and reasonable value of its estate in the condemned property of which it has been deprived.

Monongahela Navigation Co. v. *United States,* 148 U. S. 310, is in point. The Monongahela Company had, under express authority from the State of Pennsylvania, expended large sums of money in improving the Monongahela River by means of locks and dams. The particular lock and dam in controversy was built not only by virtue of this authority from the State of Pennsylvania but also at the instance and suggestion of the United States. The United States thereafter condemned and appropriated this property, including the lock and dam. In sustaining the right to just compensation the Court said (p. 329):

> "So before this property can be taken away from its owners the whole value must be paid; and that value depends largely upon the productiveness of the property; the franchise to take tolls."

And again (p. 343):

> "It is also suggested that the government does not take this franchise; that it does not need any authority from the state for the exaction of tolls, if it desires to exact them; that it only appropriates the tangible property, and then either makes the use of it free to all, or exacts such tolls as it sees fit, or transfers the property to a new corporation of its own creation, with such a franchise to take tolls as it chooses to give. But this franchise goes with the property; and the Navigation Company, which owned it, is deprived of it. The Government takes it away from the company, whatever use it may make of it;

> and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived."

And again (p. 344):

> "These are all the questions presented in this case. Our conclusions are, that the Navigation Company rightfully placed this lock and dam in the Monongahela River; that, with the ownership of the tangible property, legally held in that place, it has a vested franchise to receive tolls for its use; that such franchise was as much a vested right of property as the ownership of the tangible property; that the right of the national government, under its grant of power to regulate commerce, to condemn and appropriate this lock and dam belonging to the Navigation Company, is subject to the limitations imposed by the 5th Amendment, that private property shall not be taken for public uses without just compensation; that just compensation requires payment for the franchise to take tolls, as well as for the value of the tangible property; and that the assertion by Congress of its purpose to take the property does not destroy the state franchise."

In *Omnia Commercial Co.* v. *United States*, 261 U. S. 502, cited by the City, a claim was made by the owner of a contract by which it acquired the right to purchase a large quantity of steel plate from the Allegheny Steel Company of Pittsburgh, Pa., at a price under the market, which contract was given great value and, if carried out, would have produced large profits. In October, 1917, before any deliveries had been made the United States requisitioned the steel company's entire production of steel plate for the year 1918 and directed that company not to comply with the terms of appellant's contract under the penalty of having it taken over by the Government and operated for the public use. Mr. Justice SUTHERLAND, for the Court,

said (p. 510):

"What was here requisitioned was the future product of the Steel Company, and, since this product, in the absence of governmental interference, would have been delivered in fulfilment of the contract, the contention seems to be that the contract was so far identified with it that the taking of the former ipso facto took the latter. This, however, is to confound the contract with its subject-matter. The essence of every executory contract is the obligation which the law imposes upon the parties to perform it. 'It (the contract) may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other.' Dartmouth College v. Woodward, 4 Wheat. 629, 656, 4 L. ed. 657, 664. Plainly, here there was no acquisition of the obligation or the right to enforce it. If the Steel Company had failed to comply with the requisition, what would have been the remedy? Not enforcement of the contract, but enforcement of the statute. If the government had failed to pay for what it got, what would have been the right of the Steel Company? Not to the price fixed by the contract, but to the just compensation guaranteed by the Constitution.

In exercising the power to requisition, the government dealt only with the Steel Company, which company thereupon became liable to deliver its product to the government, by virtue of the statute and in response to the order. As a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated, but ended."

And again (513):

"In the Monongahela Nav. Co. case the property which was taken was a lock and dam, built by the company, pursuant to the invitation of the United States and the state of Pennsylvania, the latter, in consideration, giving the company a franchise to exact tolls. The franchise, therefore, was not merely a contract in respect of the property taken, but was an integral part of it; and this court (p. 329) said:

> 'So, before this property can be taken away from its owners, the whole value must be paid; and the value depends largely upon the productiveness of the property, the franchise to take tolls.'
>
> The lock and dam constituted, in effect, a going concern, whose value was, of course, affected by what it would produce."

In *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, the statute providing for condemnation expressly included contracts, and these were in fact taken and compensation therefor specifically allowed. In that case the Court said (p. 691):

> "In other words the condemnation proceedings did not repudiate the contract but appropriated it and fixed its value."

In the proceeding at bar the taking was unqualified and included every estate, interest and encumbrance in and on the condemned property without repudiation of the agreement of November 16, 1935.

CONCLUSION

The petition for certiorari should be denied, with costs.

New York, May 10, 1944.

Respectfully submitted,

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